TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 767

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY AND W. H. BREMNER, ITS RECEIVER, APPELLANTS,

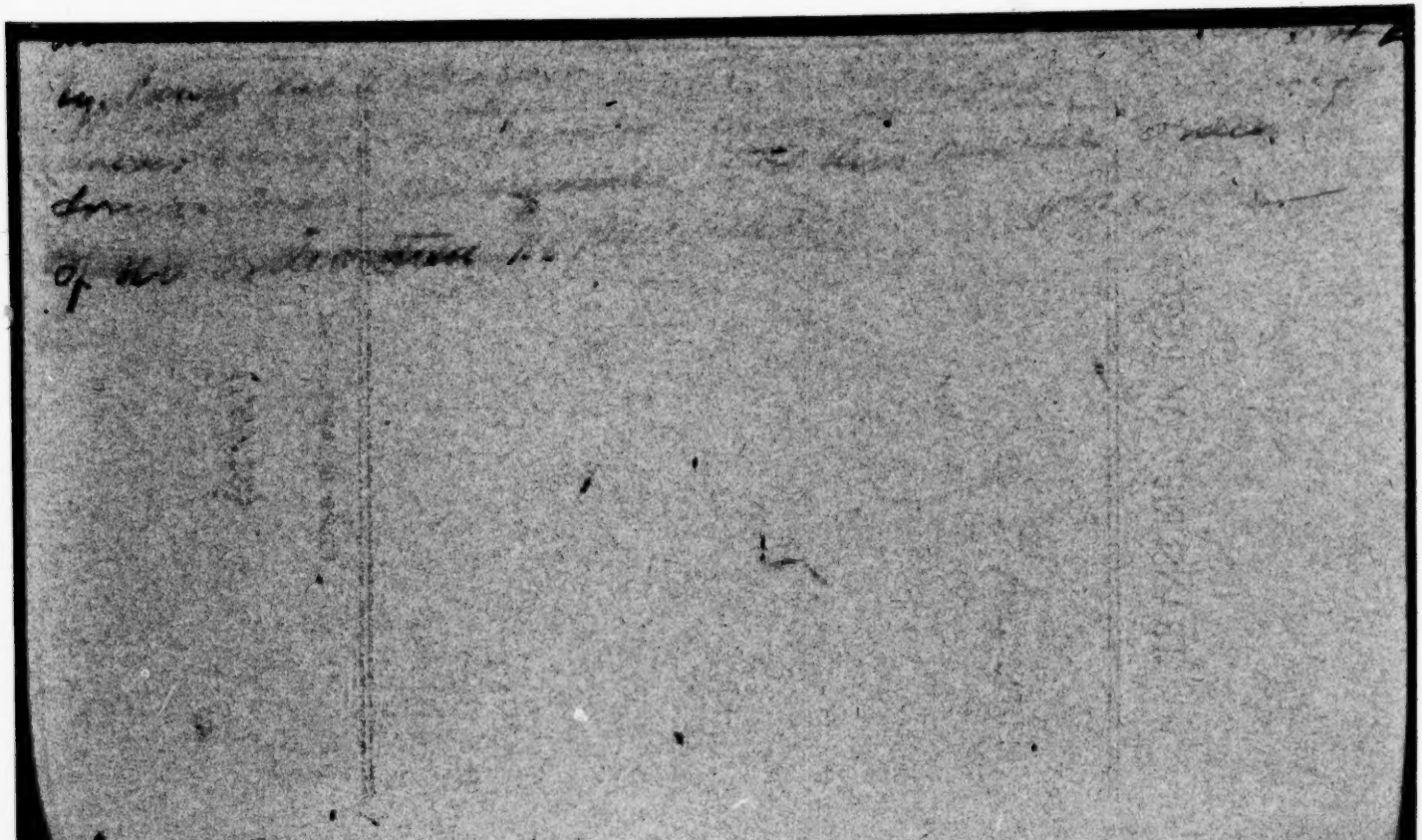
vs.

PEORIA & PEKIN UNION RAILWAY COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF IOWA

FILED OCTOBER 9, 1925

(31,490)



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INDEX

	Original	Print
Record from the district court of the United States, southern district of Iowa	1	1
Citation and service (omitted in printing)	1	1
Caption (omitted in printing)	2	1
Petition	2	1
Exhibit A—Report of I. C. C. in the case of Minneapolis & St. Louis R. R. Co. vs. Peoria & Pekin Union Ry. Co.	10	6
Exhibit B—Report of I. C. C. on switching charges at Peoria, Ill.	20	13
Temporary restraining order	30	22
Summons and marshal's return (omitted in printing)	33	
Special appearance of defendant and motion to quash service	35	22
Exhibit "A"—Affidavit of V. V. Boatner	40	26
Order for temporary injunction	45	29
Bond on temporary injunction (omitted in printing)	48	31

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 18, 1925

	Original	Print
Motion to dissolve injunction	51	31
Order on motion to dissolve injunction (omitted in printing)	56	
Answer	59	34
Stipulation granting defendant leave to file affidavit to motion to dissolve injunction (omitted in printing)	80	
Supplemental petition	81	46
Exhibit C—Order of I. C. C. for investigation of rates and making parties respondent	83	47
Order continuing temporary injunction (omitted in printing)	85	
Motion to file additional bond....(omitted in printing)..	88	
Order on motion for additional bond (omitted in printing)	90	
Stipulation submitting cause upon issues presented for final determination	92	48
Motion to dismiss petition.....(omitted in printing)..	94	
Judgment	100	49
Memorandum opinion, Sanborn, J.	102	50
Order staying order dissolving preliminary injunction (omitted in printing)	107	
Notice of motion for stay	108	54
Motion for stay	109	55
Petition for appeal	111	55
Assignments of error	112	56
Order allowing appeal	113	56
Bond on appeal.....(omitted in printing)..	115	57
Praecipe for transcript of record	117	57
Plaintiffs' Exhibit A—Transcript of hearing before Examiner J. O. Cassidy in the case of The Minneapolis & St. Louis R. R. Co. vs. Peoria & Pekin Union Ry. Co. (omitted in printing)	119	
Secretaries' certificate.....(omitted in printing)..	119	
Appearances of counsel.....(omitted in printing)..	121	
Colloquy between examiner and counsel (omitted in printing)	125	
Testimony of H. L. Stuntz....(omitted in printing)..	133	
E. J. Sturdevant (" " ")..	206	
F. B. Townsend. (" " ")..	222	
F. O. Coleman..(" " ")..	297	
John T. Redmon (" " ")..	322	
V. H. Hogelbarger (omitted in printing)	328	
W. C. Leitner....(omitted in printing)..	334	
W. A. Bartlett...(omitted in printing)..	336	
F. B. Townsend (recalled) (omitted in printing)	346	
J. P. Houston....(omitted in printing)..	361	
W. H. Bremner.(" " ")..	364	
J. A. Behrle....(" " ")..	389	

	Original	Print
Testimony of H. L. Stuntz (recalled) (omitted in printing)	407	
C. B. Sudborough (omitted in printing)	416	
J. M. Bathe.....(omitted in printing)..	441	
Edward F. Stock (" " ")..	475	
V. A. Boatner...(" " ")..	502	
E. I. Rogers....(" " ")..	501	
V. V. Boatner...(" " ")..	512	
Argument of counsel.....(" " ")..	620	
Plaintiffs' Exhibit B—Report of the I. C. C. on the investigation of intermediate switching charges at Peoria, Ill.	645	58
Report of I. C. C. in the case of Minneapolis & St. Louis R. R. Co. vs. Peoria & Pekin Union Ry. Co. (omitted in printing)	657	59
Order for investigation of rates, etc., of Peoria & Pekin Union Ry. and order making parties respondent	657	59
Plaintiffs' Exhibit C—Answer of I. C. C. in the case of Peoria & Pekin Union Ry. Co. vs. The United States et al. in district court of the United States, southern district of Illinois	669	61
Exhibit A—Peoria & Pekin Union Ry. Co. switching tariff	676	65
Exhibit C—Letter from Clyde B. Aitchison to V. V. Boatner, January 5, 1923	678	67
Exhibit D—Telegram, V. V. Boatner to G. B. McGinty, January 4, 1923	679	67
Plaintiffs' Exhibit D—Report of the I. C. C. in the matter of rates, regulations, and practices of Peoria & Pekin Union Ry. Co. at Peoria and near-by points	681	68
Plaintiffs' Exhibit E—Articles of incorporation of The Minneapolis & St. Louis R. R. Co. et al.	701	87
Plaintiffs' Exhibit F—Letter from V. V. Boatner to W. H. Bremner, July 28, 1924	728	104
Plaintiffs' Exhibit G—Affidavit of W. H. Bremner	729	105
Plaintiffs' Exhibit H—Affidavit of F. L. Johnson	732	107
Plaintiffs' Exhibit I—Affidavit of L. C. Fritch	734	108
Plaintiffs' Exhibit J—Order authorizing receiver to bring suit against the Peoria & Pekin Union Ry. Co. (omitted in printing)	736	
Defendants' Exhibit A—Contract between the Peoria & Pekin Union Ry. Co. and the proprietary lines (omitted in printing)	740	
Defendants' Exhibit B—Bill of complaint filed in the district court of the United States, southern district of Illinois, in the case of Minneapolis & St. Louis R. R. Co. vs. Peoria & Pekin Union Ry. Co. et al. (omitted in printing)	767	

	Original	Print
Defendants' Exhibit C—Answer of Peoria & Pekin Union Ry. Co. (omitted in printing)	779	
Exhibit A—Articles of incorporation of Peoria & Pekin Union Ry. Co. (omitted in printing)	804	
Exhibit B—Agreement between the Peoria & Pekin Union Ry. Co. and the Iowa Central Ry. Co., April 1, 1911 (omitted in printing)	805	
Exhibit C—Map of the Peoria & Pekin Union Ry. Co.'s lines (omitted in printing)	823	
Exhibit D—Peoria & Pekin Union Ry. Co. switching tariff (omitted in printing)	823	
Defendants' Exhibit D—Order denying motion for preliminary injunction and dismissing bill (omitted in printing)	827	
Defendants' Exhibit E—Letter from Edgar E. Clark to V. V. Boatner, August 19, 1921 (omitted in printing)	830	
Defendants' Exhibit F—Letter from E. F. Stock to I. C. C., August 26, 1921 (omitted in printing)	835	
Defendants' Exhibit G—Order of I. C. C. authorizing changes in rates (omitted in printing)	837	
Defendants' Exhibit G-1—Peoria & Pekin Union Ry. Co. switching tariff (omitted in printing)	838	
Defendants' Exhibit H—Interchange switching tariff (omitted in printing)	839	
Defendants' Exhibit I—Transcript of record filed in the Supreme Court of the United States in the case of Peoria & Pekin Union Ry. Co. vs. The United States et al. (omitted in printing)	840	
Defendants' Exhibit J—Report of the I. C. C. in the matter of rates, regulations, and practices of Peoria & Pekin Union Ry. Co. (omitted in printing)	952	
Clerk's certificate (omitted in printing)	975	
Statement of points to be relied upon and designation by appellants of parts of record to be printed, with proof of service	976	169

[fol. 1] Citation in usual form, showing service on R. V. Fletcher, filed September 17, 1925, omitted in printing.

[fol. 2] **IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF IOWA**

[Caption omitted]

PETITION—Filed August 6, 1925

Your petitioners, The Minneapolis & St. Louis Railroad Company and W. H. Bremner, its receiver, respectfully show to the court:

That The Minneapolis & St. Louis Railroad Company is a corporation organized and existing under the laws of the state of Iowa, with its principal place of business in the city of Des Moines, Iowa, in said state, and is a citizen and resident of said state and of the Southern District thereof. That W. H. Bremner is the duly appointed receiver operating the property of the said Minneapolis & St. Louis Railroad Company under the authority of the District Court of the United States, in and for the District of Minnesota, and of the District Court of the United States, in and for the Southern District of Illinois, Northern Division, at Peoria.

That the defendant, Peoria & Pekin Union Railway Company, is a corporation organized under the laws of the state of Illinois, with its principal place of business in the city of Peoria, Illinois, and is a citizen and resident of said state.

That this case is an action arising under an Act To Regulate Commerce and all acts amendatory thereof, and of the District Court Jurisdictional Act whereby jurisdiction to enforce orders of the [fol. 3] Interstate Commerce Commission is vested in the District Court in the district of the residence of the party upon whose application such order is made.

Your petitioners further show that The Minneapolis & St. Louis Railroad Company and W. H. Bremner, its receiver, as the owner and operator, respectively, of railroad property as a common carrier of freight and passengers, and the defendant, Peoria & Pekin Union Railway Company as a common carrier, are subject to the provisions of the Act of Congress known as the Act To Regulate Commerce, February 4, 1887, and acts amendatory thereof, and subject to the orders and regulations of the Interstate Commerce Commission made pursuant to authority vested by said act in the said commission.

Your petitioners further allege that in October, 1880, the defendant Peoria & Pekin Union Railway Company was organized as a corporation by certain railway companies which then were operating their respective lines of railway into the city of Peoria, Illinois, for the purpose of consolidating the terminals and terminal facilities of the respective organizing companies and to provide a means for the

joint operation of the terminal facilities thereof, and to effectuate such purpose the said defendant, Peoria & Pekin Union Railway Company, acquired the ownership or control of all the terminal facilities which theretofore were respectively used or operated by the said organizing companies.

That at the present time the Illinois Central Railroad Company, the Chicago, Peoria & St. Louis Railroad Company, the Chicago & Northwestern Railway Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the Lake Erie & Western Railroad Company, and the Toledo, Peoria & Western Railroad Company, are the owners of all the capital stock of the defendant, Peoria & Pekin Union Railway Company, and are the successors in interest of the lines heretofore mentioned as the companies which organized the corporation known as the Peoria & Pekin Union Railway Company.

[fol. 4] That the defendant company has entered into contracts with the aforesaid stockholding companies, and also with the Chicago & Alton Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, by which there is granted unto each of the said companies the right to the use in common of all of the terminal facilities of said defendant in the city of Peoria for the purpose of interchange of cars between the said tenant companies and other railroad companies within the cities of Pekin and Peoria, Illinois, with which the tracks of the defendant may at any time be connected, provided only that the interchange or transfer of said cars be made through the medium of the defendant, Peoria & Pekin Union Railway Company.

That the tracks of The Minneapolis & St. Louis Railroad Company now being operated by W. H. Bremner, as its receiver, enter the city of Peoria and do connect with the tracks of the defendant, Peoria & Pekin Union Railway Company, at a point within the city of Peoria and with a track which the aforesaid tenants of the defendant companies have the right to use under the terms of the contracts of tenancy heretofore referred to, and that the tracks of the said defendant, Peoria & Pekin Union Railway Company, are the only facilities within the city of Peoria upon which the tenants of the defendant, Peoria & Pekin Union Railway Company, are able to receive cars for transportation beyond the city of Peoria over their respective lines.

That the Chicago, Rock Island & Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company also have lines of railroad extending into the city of Peoria, the tracks of each of which connect with the tracks of the defendant, Peoria & Pekin Union Railway Company, in said city at a place where the respective tenants of the defendant company have the right under the terms of the contracts of tenancy to have cars received on their behalf, respectively, and are the only facilities which the said tenants have for receiving cars in interchange from said Chicago, Rock Island & [fol. 5] Pacific Railway Company and said Chicago, Burlington & Quincy Railroad Company.

That on or about the 26th day of August, 1921, the defendant filed with the Interstate Commerce Commission its tariff known as I. C. C. tariff No. 36, by the terms of which it was provided that a charge of $4 per car would be imposed against The Minneapolis & St. Louis Railroad Company on all cars which were delivered to it, the defendant, in interchange to it, the defendant's, tenants and also upon all cars delivered by the defendant to The Minneapolis & St. Louis Railroad Company which were being interchanged by it, the defendant, on behalf of its tenants to the said Minneapolis & St. Louis Railroad Company for transportation by the said company to points on or beyond its line.

That The Minneapolis & St. Louis Railroad Company, a corporation, with its principal place of business in the Southern District of Iowa, duly filed with the Interstate Commerce Commission its petition alleging that said tariff was in violation of law, in that among other things no provision was made for the imposition of a similar charge upon cars interchanged between the tenants of the defendant company and the Chicago, Rock Island & Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company, and that on account thereof said tariff was unjustly discriminatory and unduly prejudicial against The Minneapolis & St. Louis Railroad Company, and traffic moving over its lines, in violation of the Act to Regulate Commerce.

That said petition was docketed in the records of the Interstate Commerce Commission as No. 13110 and entitled Minneapolis & St. Louis Railroad Company vs. Peoria & Pekin Union Railway Company, and duly came on for hearing, and on the 13th day of April, 1922, the commission filed its report therein in which it found that the charges provided for in said tariff were unjustly discriminatory and unduly prejudicial and an order was entered commanding the said defendant, Peoria & Pekin Union Railway Company, to cease [fol. 6] and desist on or before July 13, 1922, and thereafter to abstain from practicing the unjust discrimination and undue prejudice found in said report to exist in respect of said defendant's charges for intermediate switching between complainant and other railroads of Peoria and East Peoria, Illinois, of freight cars moving in interstate commerce from and to points beyond Peoria and Pekin, Illinois, switching district. That a copy of the report of the commission and order entered pursuant thereto are attached to this petition and marked Exhibit "A" and by this reference made a part hereof.

Your petitioners further respectfully show to the court that the defendant, Peoria & Pekin Union Railway Company, has failed to comply with said order and has failed to cancel the tariff under which the said charges were sought to be imposed and which said tariff was found by the commission to be unjustly discriminatory and unduly prejudicial, but that the said defendant did undertake to remove the discrimination by the publication of the tariff known as I. C. C. No. 40, by the terms of which charges were sought to be imposed against the Chicago, Rock Island & Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company on cars

interchanged between said companies, respectively, and the tenants of the defendant, which tariffs were upon application of said Chicago, Rock Island & Pacific Railway Company and Chicago, Burlington & Quincy Railroad Company, suspended until after hearing, and after a formal hearing ordered cancelled. That a copy of the report of the commission and the order therein entered are attached to this petition and marked Exhibit "B" and by this reference made a part hereof, from which it appears that the attempt of the defendant company to remove the discrimination found by the commission in its report of April 13, 1922, Exhibit "A," to exist, could not be removed by the imposition of a similar charge against the said Chicago, Rock Island & Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company, which were in a position with respect to the interchange of traffic with defendant's tenants similar to that of [fol. 7] the complainant, The Minneapolis & St. Louis Railroad Company.

That the defendant, Peoria & Pekin Union Railway Company, is now, notwithstanding the mandate and order of the Interstate Commerce Commission of April 13, 1922, to cease and desist from practicing the unlawful discrimination against the traffic moving over the line of The Minneapolis & St. Louis Railroad Company, attempting to impose upon and collect from your petitioner W. H. Bremner, as receiver of The Minneapolis & St. Louis Railroad Company, a charge of $4 per car upon all traffic delivered to the said defendant company in interchange to its tenants when such cars have been transported into Peoria over the line of The Minneapolis & St. Louis Railroad Company.

Your petitioners further respectfully show to the court that the imposition of such charge constitutes an unlawful discrimination in violation of the terms of the order of the Interstate Commerce Commission heretofore referred to, which was dated and duly served upon the defendant on or about April 13, 1922, in that no similar charge is imposed or attempted to be imposed against other common carriers similarly situated.

Your petitioners further respectfully show to the court that the said defendant, Peoria & Pekin Union Railway Company, is attempting to enforce the collection of such unlawful and unjust discriminatory charge against the petitioners by a threat to refuse to receive cars tendered to it in interchange to its tenants and thus cause an interruption in the movement of interstate traffic to the serious injury of these petitioners and to the shippers along the route of The Minneapolis & St. Louis Railroad Company.

Wherefore, your petitioners pray that a writ of subpœna be issued against the defendant, commanding it to appear and fully submit and make answer to this petition, but not under oath, an answer under oath being expressly waived; and

That the defendant, its agents and servants, be enjoined by final [fol. 8] decree, and meanwhile by preliminary injunction as follows:

That the said defendant, Peoria & Pekin Union Railway Company, its agents and servants be enjoined and restrained from refus-

ing to receive cars tendered by the petitioners or either of them for interchange to the tenants of the said defendant, Peoria & Pekin Union Railway Company, and that they be enjoined and restrained from collecting or attempting to collect any charge against cars moving in interstate commerce from the line of The Minneapolis & St. Louis Railroad Company for delivery to any of the tenants of the Peoria & Pekin Union Railway Company in violation of the order of the Interstate Commerce Commission entered in the cause pending before it, entitled Minneapolis & St. Louis Railroad Company vs. Peoria & Pekin Union Railway Company, known as Docket No. 13110, and that it be enjoined and commanded to cease and desist from practicing the unlawful and unjust discrimination against the petitioners found by the report of the Interstate Commerce Commission in said proceeding and of said date to exist.

And your petitioners further pray that pending hearing upon the prayer for the issue of the preliminary injunction herein a temporary restraining order be issued in accordance with the prayer of this petition and that the prayer for the issue of a preliminary injunction be set down for hearing, all in order that the petitioners may not suffer irreparable injury and damage as would otherwise occur.

(Sgd.) M. M. Joyce, (Sgd.) Donald Evans, Solicitors for Petitioners.

[fol. 9] *Duly sworn to by W. H. Bremner. Jurat omitted in printing.*

[fol. 10] EXHIBIT A TO PETITION

7588

INTERSTATE COMMERCE COMMISSION

No. 13110

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY

v.

PEORIA & PEKIN UNION RAILWAY COMPANY

[fol. 11] No. 13110 [1]

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY

v.

PEORIA & PEKIN UNION RAILWAY COMPANY

Submitted March 18, 1922. Decided April 13, 1922

Switching charges of defendant effective from complainant's rails, and proposed from protestant's rails, at Peoria, Ill., to defendant's tracks at Peoria and East Peoria, Ill., found unjustly discriminatory and unduly prejudicial. Unlawful discrimination and prejudice ordered removed. Suspended schedules ordered canceled.

M. M. Joyce and Donald Evans for complainant.

Silas H. Strawn and Frank H. Towner for protestant and interveners.

R. V. Fletcher, John M. Elliott, Thomas W. White, and John B. Cockrun for defendant.

James A. Fenelon for Eighth District Coal Operators Association; John W. Bingham for Corn Products Refining Company; W. J. Gorman for United States Food Products Corporation, Liberty Yeast Company, and American Distillery; E. G. Schaefer for Keystone Steel & Wire Company; and W. E. Schuman for city of Pekin, Ill.

Report of the Commission

Division 2, Commissioners Daniels, Esch, and Cox

ESCH, Commissioner:

These cases were separately heard but were argued together and will be disposed of in one report. In No. 13110 the Minneapolis & St. Louis Railroad Company hereinafter referred to as complain-

[1] This report also embraces Investigation and Suspension Docket No. 1455, In the Matter of Intermediate Switching Charges at Peoria and Pekin, Ill.

ant, attacks as unreasonable, unjustly discriminatory, and unduly prejudicial the charge of $4 per car established August 30, 1921, by the Peoria & Pekin Union Railway Company, hereinafter referred to as defendant, for switching freight cars between the rails of complainant at Peoria, Ill., and defendant's tracks in its East Peoria, Ill., yards, where the cars come from or are destined to points beyond the Peoria-Pekin, Ill., switching district. The Chicago & Alton [fol. 12] Railroad Company and Peoria Railway Terminal Company intervened in support of the complaint. In Investigation and Suspension Docket No. 1455, by schedules filed to become effective December 16, 1921, defendant proposed to establish charges of $4 per car for switching freight cars in similar service between the Peoria Railway Terminal at Peoria and defendant's tracks in the East Peoria yards, and $3.50 per car between the Peoria Railway Terminal and defendant's tracks in yards other than the East Peoria yards. Upon protest of the Peoria Railway Terminal Company, hereinafter referred to as protestant, the tariff was suspended until May 15, 1922.

The rails of complainant terminate at Iowa Junction, a point within the switching limits of Peoria, but approximately 2 miles from the passenger station at that point. Protestant has a line from Pekin, along the west bank of the Illinois River to Peoria with terminal facilities at both points. Pekin is situated on the east bank of the Illinois River and Peoria on the west bank approximately 9 miles apart. Defendant has a single-track line to Peoria from a point on the west bank of the river directly across from Pekin, which line generally parallels the line of protestant. On the east side of the river defendant has a double-track line between Pekin and Peoria with a bridge crossing at Peoria, where connection is made with the single-track line. Protestant and defendant have connections with trunk lines at Pekin and at Peoria and compete in the handling of both local and through traffic. Defendant has terminal yards in Peoria proper and at East Peoria, a point on the east bank of the Illinois River but within the switching limits of Peoria. Complainant and protestant can interchange traffic with all of the trunk lines which enter Peoria proper, except the Chicago & North Western, without using defendant's facilities. The termini of the trunk lines serving Peoria from the south and east are at or near defendant's East Peoria yard, and traffic interchanged between these lines and complainant or protestant is handled by defendant.

The capital stock of protestant is jointly owned by the Chicago & Alton and Chicago, Rock Island & Pacific. The capital stock of defendant is jointly owned by the Illinois Central, Cleveland, Cincinnati, Chicago & St. Louis, Lake Erie & Western, Chicago, Peoria & St. Louis, Chicago & North Western, and Toledo, Peoria & Western. The six roads last named, also the Chicago & Alton and Pittsburgh, Cincinnati, Chicago & St. Louis, have contracts with defendant under which defendant agrees to perform terminal services for them and under which they are granted certain rights to the use of defendant's facilities. Complainant had a similar contract with defendant which expired March 31, 1921. Complainant declined to renew this con-

tranet and entered into an agreement with the Chicago, Rock Island [fol. 13] & Pacific whereby it uses the terminal facilities of that road at Peoria proper. But these facilities do not enable complainant to interchange traffic with defendant's tenant lines, and as before indicated defendant's facilities are used in making such transfer.

Cars coming into Peoria over the rails of complainant and going to defendant's tenant lines at East Peoria for outbound movement are delivered to defendant at Iowa Junction, usually in trains with cars otherwise destined, and are switched by defendant to the East Peoria yards, where the trains are broken up and the cars switched to designated tracks and placed in new trains for outbound movement. On this traffic defendant performs a train break-up, switching, and train make-up service. In the reverse direction defendant performs a similar service except that it does not make up trains for complainant, the cars being merely deposited in complainant's Bartlett yard situated just west of Iowa Junction. Cars coming into Peoria via protestant's line for outbound movement via the Chicago & North Western are delivered by protestant to defendant upon an interchange track in what is known as the Chicago & North Western yard. This yard was formerly operated by and as a part of the Chicago & North Western but is now leased and operated by defendant as a part of its terminal facilities. After defendant receives the cars from protestant it switches them to designated make-up tracks in the Chicago & North Western yard and places them in trains for outbound movement. Defendant performs no break-up service on this traffic and such switching as it performs seems to be largely, if not wholly, incidental to the make-up service for the Chicago & North Western. Cars which come in over protestant's rails and are to move outbound via lines whose rails terminate at East Peoria are taken in train lots by protestant to defendant's yards 90 and 91, which are situated approximately 1 mile from the end of protestant's rails. Defendant switches the trains from these yards to the East Peoria yards, where they are broken up and the cars switched to appropriate tracks and placed in trains for outbound movement. The service rendered by defendant upon this track is similar to that rendered in connection with cars coming from complainant's rails except that the trains are received at yard 90 or 91 instead of at Iowa Junction. In the reverse direction defendant delivers the cars on protestant's own rails but performs no make-up service.

It is the contention of the complaining and protesting parties that defendant's facilities, in so far as the traffic here involved is concerned, are mere terminal projections of the tenant lines; that it is the duty of the tenant lines to receive and deliver through traffic [fol. 14] at complainant's and protestant's rails and that defendant by reason of its relation to the tenant lines is precluded from making a separate charge. In determining these contentions we may look to the contracts between defendant and its tenants and the interpretation placed upon them by the contracting parties as evidenced by actual operation thereunder.

The preamble to the contract entered into in 1881 between defendant and its original proprietary lines recited that those lines "for the more convenient and economical transaction of their business and the better accommodation of the public, desire to extend their facilities in the city of Peoria, * * * and to that end have caused to be organized and incorporated * * * the said Peoria and Pekin Union Railway Company * * *." The contract further recited that defendant had acquired certain facilities and that the use and enjoyment of those facilities within the limitations of the contract were leased and demised to the proprietary lines, which at that time were the only tenants. The tenants were granted the use of defendant's main and passing tracks between Pekin and Peoria for the movement of their trains with their own power and the "right to the use of all the transfer tracks, side tracks, switches, and turnouts and other terminal facilities of the first party (defendant) * * * for the transfer of loaded and empty freight and other cars by the said first party from and to all freight houses, * * * and to and from the tracks and warehouses of other railroads, with which any of the tracks of the first party shall at any time be connected * * *." These provisions show that defendant was primarily created to perform terminal work which would normally be done by the tenants individually. But they also recognize a separate character in defendant in that its facilities may be used in purely terminal service only through defendant as the operating medium. So far as purely terminal service was concerned the tenants acquired only the right to have defendant handle their traffic.

The contract also provided that no stockholder should transfer its holding of capital stock of defendant without the consent of all other stockholders; that the board of directors of defendant should be selected by the proprietary lines and that each should at all times have equal representation on the board; that no managing officer of defendant should be selected without the approval of each proprietary line and that subordinate officers and employees should be subject to peremptory discharge on the request of any party to the contract. The contracts with the present proprietary lines are substantially similar and while disclosing a purpose on the part of those lines to keep the affairs of defendant closely within their [fol. 15] control, do not necessarily establish in defendant the status alleged by complainant. Furthermore, two of the tenant lines hold no stock in and have no control over the affairs of defendant.

Defendant is not shown as an intermediate concurring carrier in tariffs naming joint rates via Peoria, or in many instances as an originating or delivering carrier in tariffs of the tenant lines naming rates to and from Peoria. But this has no particular significance as our tariff regulations do not require the concurrence of purely intermediate or terminal switching lines in tariffs of this class. Defendant does not issue bills of lading for shipments originating on its rails and routed via tenants from Peoria or East Peoria. This also has little significance as originating carriers which per-

form switching services only do not usually issue bills of lading. Order of May 20, 1911, Relative to Irregularities in Dating Bills of Lading. There is some conflict in the testimony as to whether defendant pays per diem on cars which it handles in transfer service between its connections or participates in the payment of claims for loss and damage.

The contracts clearly grant to the tenants the right to full use of defendant's terminal facilities in having their traffic transferred between their rails and the rails of carriers with which defendant connects, and obligate defendant to perform the transfer service where demanded by the tenants. But we do not concur in the view expressed by complainant that having the right carries with it the obligation on the part of the tenants to exercise the right in full and pay the entire cost of the transfer service. The testimony shows that in the interchange of cars between tenant lines, each tenant has paid a part of the cost of the intermediate service rendered by defendant. The contracts provide that each tenant shall pay to defendant $22,500 annually, plus a share of maintenance and upkeep costs on main tracks and certain appurtenant facilities used directly by the trains of the tenant or by defendant in performing transfer service for the tenant, and a reasonable sum per car which is to approximate as nearly as may be the actual cost of the service rendered by defendant. At present this latter charge is $2.70 per car. As illustrative, on traffic coming into East Peoria via the Lake Erie & Western and going out from Peoria over the Chicago & North Western the inbound carrier pays defendant, in addition to the annual rental, $2.70 per car plus its share of the upkeep and maintenance costs, and the outbound carrier likewise pays defendant, in addition to the annual rental, $2.70 per car plus its share of the maintenance and upkeep costs. The total expense to each tenant under this arrangement is stated by defendant to be about $4 per car. Not only has the above practice prevailed as to traffic inter- [fol. 16] changed between tenant lines of different ownership, but it has also been followed in the case of traffic interchanged between the different divisions of intervener, Chicago & Alton. It is clearly evident therefore that according to the interpretation placed upon the contracts by the parties thereto, defendant is not fully compensated by the amount it receives from one tenant or one division of intervener. If this is true as to traffic transferred for tenant lines, we do not see how there can be escape from the conclusion that defendant is not fully compensated by the tenant lines for the service it renders on traffic transferred between tenants and nontenants.

Carriers whose rails do not connect at interchange points may join in the establishment of through routes and joint rates and may employ a switching line to effect transfer of traffic between their rails. The extent to which each shall participate in compensating the switching line under such an arrangement is largely a matter of agreement between the employing carriers. In the absence of agreement to the contrary, it would not seem unfair that the expense should be shared equally. However, divisions are not at issue in

these cases. The question for determination is whether defendant may lawfully maintain a tariff charge for service which it renders and is not being compensated for under its contracts with its tenants. It is interesting to note, however, that at the time of fixation of divisions of joint rates as between lines east of Peoria and those west complainant was a tenant of defendant and as such bore its share of the interchange expense. It has now withdrawn from tenancy and desires to shift to the tenant lines the portion of the expense which it formerly bore.

Southern Pacific Terminal Co. v. I. C. C., 219 U. S., 498, and Chicago, Milwaukee & St. Paul Ry. v. Minn. Civic Assn., 247 U. S., 490, are cited as supporting the contention that defendant is a mere projection of the rails of the tenant lines. The facts and circumstances in those case were materially different from those in the instant cases and we do not consider the decisions as controlling here. Defendant specifically reserves in the contracts with its tenant lines the right to perform terminal services and generally carry traffic for others, and this right it extensively exercises. It files tariffs with and makes reports to us and maintains local freight and passenger service. In St. Louis, Springfield & Peoria R. R. v. P. & P. U. Ry. Co., 26 I. C. C., 226, we found defendant to be a common carrier subject to the act. The evidence in these cases substantiates that finding. We are of the opinion and find that defendant is an independent common carrier and as such entitled to just and reasonable compensation for the services which it renders. We are further of opinion and find that, with possibly the exception of traffic inter- [fol. 17] changed between protestant and the Chicago & North Western, defendant is not now compensated by the tenant lines for all of the service it renders in effecting transfers between those lines and nontenant lines, and may maintain reasonable tariff charges for such uncompensated service, provided in so doing it does not practice unlawful discrimination.

Defendant performs interchange service between the rails of its tenants and the Chicago, Burlington & Quincy and Chicago, Rock Island & Pacific and makes no charge for such service and receives no compensation therefor except such as it receives under its contracts with its tenant lines. Complainant is in competition with the two lines mentioned in the handling of traffic from and to certain territories. Defendant, while stating that there is a distinction to be drawn between complainant and the two roads above mentioned in that the latter have more extensive terminals at Peoria, does not attempt to justify in full the failure to make a charge on traffic interchanged with these roads, and states that negotiations are now under way looking to the securing of compensation from those lines for services for which it is not now compensated by its tenants. We are of opinion and find that the charges under consideration are unjustly discriminatory and unduly prejudicial against complainant and protestant.

The records are not sufficiently developed to justify an expression of opinion as to what would constitute reasonable charges, but if de-

fendant elects to remove the discrimination and prejudice by making a charge on traffic handled in interchange service between the Chicago, Rock Island & Pacific and Chicago, Burlington & Quincy and defendant's tenants, we will consider a petition to reopen the cases for the purpose of determining what would constitute reasonable charges. Orders requiring the removal of the unlawful discrimination and prejudice and cancellation of the suspended schedules will be entered.

[fol. 18] Orders

At a Session of the Interstate Commerce Commission, Division 2, Held at Its Office in Washington, D. C., on the 13th Day of April, A. D., 1922.

No. 13110

The Minneapolis & St. Louis Railroad Company

v.

Peoria & Pekin Union Railway Company

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, notified and required to cease and desist, on or before July 13, 1922, and thereafter to abstain, from practicing the unjust discrimination and undue prejudice found in said report to exist in respect of said defendant's charges for intermediate switching between complainant and other railroads at Peoria and East Peoria, Ill., of freight cars moving in interstate commerce from and to points beyond the Peoria-Pekin, Ill., switching district.

It is further ordered, That said defendant be, and it is hereby, notified and required to establish, on or before July 13, 1922, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain charges or practices with respect to intermediate switching between complainant and other railroads at Peoria and East Peoria, Ill., of freight cars moving in interstate commerce from and to points beyond the Peoria-Pekin, Ill., switching district which will avoid and prevent the unjust discrimination and undue prejudice found in said report to exist.

And it is further ordered, That this order shall continue in force until the further order of the commission.

[fol. 19] Investigation and Suspension Docket No. 1455

Intermediate Switching Charges at Peoria and Pekin, Ill.

It appearing, That by order dated December 15, 1921, the commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules described in said order, and subsequently ordered that the operation of said schedules be suspended until May 15, 1922;

It further appearing, That a full investigation of the matters and things involved has been had, and that said division, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the respondent herein be, and it is hereby, notified and required to cancel said schedules, in so far as they are intended for application to shipments moving in interstate commerce, on or before May 14, 1922, upon notice to this commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the interstate commerce act, and that this proceeding be discontinued.

By the commission, division 2.

George B. McGinty, Secretary. [Seal.]

A true copy. (Sgd.) George B. McGinty, Secretary. (Interstate Commerce Seal.)

[fol. 20] Exhibit B to Petition

8182

Interstate Commerce Commission

Investigation and Suspension Docket No. 1596[1]

Intermediate Switching Charges at Peoria, Ill.

Submitted November 9, 1922. Decided December 22, 1922

Schedules filed by the Peoria & Pekin Union Railway Company found not justified; cancellation ordered. Original report in No. 13110, 68 I. C. C., 412.

R. V. Fletcher and J. M. Elliott for Peoria & Pekin Union Railway Company; M. M. Joyce, Donald Evans, and F. B. Townsend for Minneapolis & St. Louis Railroad Company; Kenneth F. Burgess

[1] This report also embraces No. 13110, Minneapolis & St. Louis Railroad Company v. Peoria & Pekin Union Railway Company.

and Walter McFarland for Chicago, Burlington & Quincy Railroad Company; A. B. Enoch for Chicago, Rock Island & Pacific Railway Company; Silas H. Strawn and F. H. Towner for Peoria Railway Terminal Company; and Jas. A. Knowlton for St. Louis, Springfield & Peoria Railroad Company.

W. T. Cornelison for Peoria Board of Trade, Mueller Grain Company, Lessees of Central City Elevator, and Burlington Elevator Company.

Report of the Commission

By the COMMISSION:

In the original report in No. 13110, 68 I. C. C., 412, which also embraced Investigation and Suspension Docket No. 1455, In the Matter of Intermediate Switching Charges at Peoria and Pekin, Ill., we found that the Peoria & Pekin Union Railway Company, hereinafter referred to as respondent, was a common carrier and performed certain uncompensated intermediate services at Peoria and East Peoria, Ill., between the Minneapolis & St. Louis Railroad, hereinafter referred to as complainant, and the Peoria Railway Terminal on the one hand, and the proprietary and nonproprietary tenants of respondent on the other hand; that reasonable tariff charges might be assessed for such uncompensated services; but that the charges then effective to and from complainant's rails and those proposed to and from the Peoria Railway Terminal were unjustly discriminatory and unduly prejudicial, in that no similar charges were assessed on traffic handled in intermediate service between the [fol. 21] Chicago, Burlington & Quincy or Chicago, Rock Island & Pacific, herein called the Burlington and Rock Island, respectively, and respondent's tenants. No finding was made with regard to the reasonableness of the charges.

By schedules filed to become effective July 1, 1922, respondent proposes to remove the discrimination and prejudice by the establishment of charges for intermediate service on traffic to and from the Burlington and Rock Island. The schedules also propose changes in the charges formerly proposed on traffic to and from the Peoria Railway Terminal. The schedules define the proposed charges as—

Intermediate switching rates on all freight cars from and to points beyond the Peoria-Pekin switching district regardless of origin or destination, except empties on which this company receives a loaded haul one way. Intermediate service only. * * * Will not apply to switching service rendered tenant companies under tenancy contracts.

Upon protest of the Burlington, the Rock Island, and Peoria Railway Terminal, hereinafter referred to as protestants, the operation of the schedules was suspended as to interstate traffic to November 28, 1922, and respondent has voluntarily postponed the effective date of the suspended schedules to February 1, 1923. Upon petition of complainant, No. 13110 was reopened for further hearing in connection with No. 1596.

Respondent was incorporated under the general railroad act of Illinois in September, 1880; and in November, 1880, and January, 1883, respectively, acquired by purchase a section of railroad formerly belonging to the Peoria, Pekin & Jacksonville Railroad, extending along the west side of the Illinois River from Pekin to Peoria about 9 miles, and a section formerly belonging to the Peoria & Springfield Railroad, extending from Pekin along the east side of the Illinois River to Bridge Junction, Ill., at which point there was a connection with the section already acquired. In January, 1881, respondent acquired by lease, and has since operated, terminal properties and facilities in Peoria owned by the Toledo, Peoria & Western. Since the date of its creation respondent has materially enlarged its facilities and now owns 26.9 miles of main line, 116.5 miles of siding and yard tracks, 39 locomotives, and 11 passenger and 234 freight cars, and has an average of 1,200 employees.

On February 1, 1881, respondent entered into contracts with the Indiana, Bloomington & Western, now a part of the Cleveland, Cincinnati, Chicago & St. Louis; the Wabash, St. Louis & Pacific, now the Toledo, Peoria & Western; the Peoria & Jacksonville, now the Chicago, Peoria & St. Louis; and the Peoria, Decatur & Evansville, now a part of the Illinois Central, which obligated respondent to perform terminal services for those roads and which gave them cer- [fol. 22] tain rights of user in the properties and facilities of respondent. Pertinent extracts from the contracts are quoted in the original report in No. 13110. While the contracts recited, in substance, that respondent had been created by the other contracting parties primarily to perform their terminal work in Peoria, they recognized a separate status in respondent in many ways. Respondent was given not only the right to perform all terminal services of the other contracting parties but also the right to engage in other kinds of transportation and to enter into terminal-service contracts with other railroads on the same terms as provided in the contracts with the proprietary lines. Contracts substantially similar in terms to the original contracts were subsequently entered into with the successors to the original proprietary lines; with the Chicago & Alton, the Pittsburgh, Cincinnati, Chicago & St. Louis, and complainant, nonproprietary lines; and with the Lake Erie & Western and the North Western, proprietary lines. The contract with complainant expired on March 31, 1921, and has not been renewed.

For many years respondent's principal terminal yards were on the west side of the Illinois River in the city of Peoria, but, in 1907, the traffic having outgrown the existing facilities, a new yard was constructed directly across the river in East Peoria, and this is now respondent's principal yard. The East Peoria yard is within the switching but not the corporate limits of Peoria.

On the east side of the river respondent connects with the Illinois Central, Cleveland, Cincinnati, Chicago & St. Louis, and Chicago, Peoria & St. Louis at Pekin; with the Chicago & Alton (southern division) at Grove, a point about midway between Pekin and Peoria; with the Lake Erie & Western at Wesley Junction, near the western entrance to the East Peoria yard; and with the Toledo, Peoria

& Western and the St. Louis, Springfield & Peoria, hereinafter termed the traction system, at points just east of the East Peoria yard. On the west side of the river respondent connects with the Toledo, Peoria & Western at Hollis, 7.8 miles from the East Peoria yard; with complainant and the Peoria Railway Terminal at or near Iowa Junction, about 3.5 miles from the East Peoria yard; with the North Western at C. & N. W. Junction, 2.5 miles from the East Peoria yard; and with the Burlington and Rock Island at points in the city of Peoria, 1.5 and 3 miles, respectively, from the East Peoria yard. There is also a connection with the Toledo, Peoria & Western in the city of Peoria, but this is used principally for passenger traffic. The Chicago & Alton and the Pittsburgh, Cincinnati, Chicago & St. Louis use the tracks of the Toledo, Peoria & Western from the east, and these roads have the same connection with respondent on the east side of the river as the Toledo, Peoria & Western. Of the lines with which connection for handling freight is made on [fol. 23] the west side of the river, the North Western is the sole tenant of respondent. On the east side all the connections except the traction system are tenants. Excepting the North Western, all tenant lines run their freight trains with their own power over respondent's rails to and from the East Peoria yard. Therefore, as to through traffic which is interchanged between tenants, excepting the North Western, respondent generally performs no hauling service, except such as is incidental to breaking up and making up trains in the East Peoria yard. For this service respondent publishes a tariff charge of $2.40 per car, reduced from $2.70 on October 3, 1922, and this charge is absorbed by the line-haul carriers. On traffic interchanged between the east-side tenants and the North Western, respondent performs the haul between the East Peoria and the North Western yards under separate arrangement with that line. The North Western yard is situated near the connection between respondent and the North Western. It is owned by the latter road but operated under lease by respondent.

Cars coming into the East Peoria yard from tenant lines and going out of Peoria over nontenant lines are taken by respondent from the inbound trains of the tenants and hauled to tracks on the west side of the river owned by the nontenants and designated by them as receiving tracks. In the reverse direction the Burlington and Rock Island run their trains over respondent's rails to the East Peoria yard, but respondent hauls the cars to the East Peoria yard when coming from the Peoria Railway Terminal or complainant, and it has expressed a willingness to do likewise with respect to cars coming from the Burlington and Rock Island.

Complainant and protestants do not contend that stock ownership by certain tenants deprives respondent of a common-carrier status, or deny that as to certain classes of traffic, not here in question, respondent functions as an independent common carrier, but they contend that as to the through traffic under consideration respondent operates merely as an agency of the tenant lines. Protestants admit, in substance, that even as to the traffic in issue respondent could make of itself a separate carrier by becoming a party to the joint rates and

securing its compensation through divisions. In other words, it seems to be the position of protestants that respondent has the attributes of a separate common carrier, but that it has submerged its identity, as to the class of traffic here involved, by becoming a party to contracts which constitute it an agency. The contentions of the traction system differ materially from those of the other opponents of the proposed charges, recognizing an obligation to pay for interchange service, but disputing the propriety of the proposed charge. [fol. 24] The contracts reserve to the tenant lines the right to require of respondent a complete intermediate service, and require each tenant to pay to respondent, in addition to a fixed sum per annum, the maintenance and upkeep costs, apportioned on a wheelage basis, of the main-line tracks and facilities used by the trains or traffic of the tenant, and reasonable charges for switching to and from freight houses and industries and for "the transfer service hereinbefore required to be done to and from connecting railroads, being a uniform rate per car * * * which shall approximate the actual cost of such service as nearly as practicable, which shall include the charges for making up trains." Respondent receives no greater amount from an individual tenant on a car interchanged with a nontenant that it receives on a car interchanged with another tenant. The Minneapolis & St. Louis, when it was a tenant, assumed part of the cost of the intermediate service, but now contends that the obligations of the remaining tenants cover a complete intermediate service, and that it is absolved from obligation to pay any part of the intermediate expense. Its position in this regard is based in part upon changed conditions in that, since the termination of its contract, it has provided additional tracks near Iowa Junction for the receipt of cars and to that extent is not dependent upon respondent.

The contention that respondent as to the intermediate service is acting solely in the capacity of agent for the tenant lines is partially predicated upon the ground that those lines, except the North Western, have no terminal facilities in Peoria. As to local traffic to and from Peoria, respondent concedes itself to be the terminal agency of the tenants. The tenants hold themselves out to handle traffic to and from Peoria, but they have no independent terminals in that city and employ respondent to do their terminal work. Where a carrier holds itself out to carry traffic to and from a certain point, it must reach that point either over its own facilities or through those of others; where two carriers join in the publication of joint rates and establish through routes via junctions where their rails do not meet, there is a holding out to the public of intermediate carriage between their respective lines which must be protected. The general practice is for the intermediate switching road to file a tariff naming its switching charge, and this charge is absorbed by one or other of the line-haul carriers under appropriate tariff provisions.

Tariffs of some of the tenants state that those lines have direct connections with other line-haul carriers at Peoria, notwithstanding that the intermediate transfer is performed by respondent, and con-

plainant urges that this is proof that respondent has no separate status as to through traffic. The tariffs are not uniform. Some show [fol. 25] respondent as an intermediate carrier; another indicates that there is direct connection between certain nontenant lines, although their rails do not meet and respondent's facilities are used in effecting the intermediate carriage. Cars interchanged between tenants and non-tenants are not taken into the accounts of respondent, nor does respondent participate in the per diem arrangements on such cars. Respondent does not seem to have adhered to a consistent policy with regard to the payment of loss and damage claims on through traffic. In some instances it has participated in the payment of such claims, and it appears to have declined to participate in others. At times when claims for concealed loss and damage were presented to the respondent, it has disclaimed liability on the express ground that it was not an intermediate carrier on shipments through Peoria, but simply an agent for the tenant lines. This was done by the authority of the president of the Peoria & Pekin Union.

Generally speaking, divisions of the joint rates as among the line-haul carriers were fixed at a time when the entire intermediate service was performed on the west side of the river, and protestants contend that the proposed charges, in substance, represent an effort to change existing divisions, without regard to the provisions of the interstate commerce and transportation acts.

The Burlington and Rock Island contend that the situation with regard to traffic interchanged with their lines is distinguishable from that pertaining to traffic interchanged with complainant, in that they have long had extensive terminals at Peoria, have never been parties to terminal contracts or agreements with respondent, and have always received divisions which did not take into account any portion of the intermediate service.

Should these tariffs become effective, where there are no joint rates and the combination rates break on Peoria, the charges will accrue against the traffic. The resulting increase of rates has not been justified, and this furnishes one ground for requiring the cancellation of the proposed schedules.

There are other grounds for such action. The essential difficulty in this case is that what originally was primarily a terminal agency operating in a limited way within a limited territory has in the course of time expanded its facilities and enlarged the extent of the services it renders. The contracts under which it receives compensation from its proprietors, even should it assess and collect the proposed charges, are, by its own admission, insufficient to reimburse it fully for all the services it has in the past performed and now performs solely as their agent. Without first exacting adequate compensation from its proprietors or tenants by insisting upon a revision of the antiquated contract under which its compensation is [fol. 26] fixed, it now contends that these services or certain of them are rendered by it as an independent common carrier, and seeks by tariff publication to exact compensation from nonproprietary connections.

There is here involved not only a very complicated concrete situation, but one which involves the fundamental question whether a common carrier may perform a service of common carriage as an agent for another common carrier, and if so, under what conditions as to the charges therefor, whether under contracts, or partly under contracts and partly by tariff publication. The unbroken construction put upon the interchange service of the Peoria & Pekin Union as well by its proprietors and tenants as by the respondent itself from February 1, 1881, until mid-summer of 1921 is consistent only with the assumption that respondent in respect of these interchange services was exclusively an agent of its tenant lines and not a common carrier.

The Burlington has never paid anything to the respondent for interchange service. Until the present controversy the respondent never has claimed that it performed any service for the Burlington. Divisions with connections have always been arranged in conferences, at none of which has the Union ever been present.

Moreover, the local switching service which the respondent performs on traffic originating or terminating at Peoria proper and moving via the tenant lines is admittedly performed by the Peoria & Pekin Union, not as a common carrier, but solely as an agent for its tenants.

Clearly the extent to which and the time during which the respondent acts as an agency and the extent and the time as to which it acts as a common carrier can not depend on its mere say-so. It can not for 40 years acquiesce in the role of agent and directly disclaim the responsibilities attaching to an independent common carrier, and immediately, upon its mere asservation as to its status, or upon allegation or proof that it is not fully compensated by its principals for the service it has been claiming to perform, as agent only, acquire the status of a common carrier and exert the latter's rights against connecting railroads.

In short, there is apparently something more necessary to clear up the situation here presented than the mere piecemeal filing of particular tariffs covering services now alleged to be those of a common carrier. We shall not prejudge the question of the status of the respondent, nor the propriety of what rates or charges or divisions or practices should supplant the existing arrangements. In view of the determination made that these schedules have not been justified it will suffice here to indicate that we shall on our own motion insti- [fol. 27] tute an investigation, making all parties to this case and all tenants of the Peoria & Pekin Union respondents, to the end that lawful, just, reasonable, and nonprejudicial practices, rates, and charges, and divisions thereof, shall be established for the services undertaken by them or any of them in connection with traffic moving to, from, through, or within the Peoria-Pekin district. There may perhaps properly be excepted such traffic as passenger or local freight traffic between Peoria and Pekin which is admitted on all hands to be performed by that company as an independent common carrier.

In view of the investigation to be undertaken we shall here make

no finding in No. 13110, and shall issue a formal order of dismissal in that case, without prejudice to recanvassing the situation there involved in the course of the investigation aforesaid.

We find the proposed schedules have not been justified, and an appropriate order will be entered.

ESCH, Commissioner, dissenting:

This proceeding involves a controversy between carriers, and shippers are not here protesting against increased rates. Respondent was held to be a common carrier subject to the act in St. Louis, Springfield & Peoria R. R. v. P. & P. U. Ry. Co., 26 I. C. C., 226, decided February 10, 1913. If the act requires respondent to file and publish the charges for all of its services, we should not prevent it from complying therewith at the earliest possible moment, even though certain services may be performed under the tenancy contracts; but the suspended schedules provide that the proposed charges "will not apply to switching service rendered tenant companies under tenancy contracts," the record shows that respondent is not compensated under the tenancy contracts for the intermediate services to and from nontenants, except the making up and breaking up of trains of the tenant lines, respondent can not, therefore, be considered the agent of those lines as to such uncompensated services, and it is entitled to publish reasonable tariff charges therefor, even if the act does not require it to publish all of its charges.

The decision herein deprives respondent of the revenues that it would have received from the proposed charges, pending the outcome of the investigation instituted on the commission's own motion, and also continues the unjust discrimination and undue prejudice against the complainant found to exist in the original report in No. 13110, 68 I. C. C., 412.

In my opinion the proposed charges are unreasonable and discriminatory in certain instances, but respondent should have been permitted to establish reasonable and nondiscriminatory tariff charges for the services under consideration, and if the line-haul carriers [fol. 28] failed to agree as to which of them should absorb such charges, that question could then have been determined in a proceeding to which the tenant, as well as the nontenant lines, were parties with respondent.

I am authorized to state that Chairman McChord and Commissioner Meyer concur in the above dissent.

Commissioner Cox also dissents.

Commissioner Campbell did not participate in the disposition of this case.

[fol. 29] Orders

At a General Session of the Interstate Commerce Commission, Held at its Office in Washington, D. C., on the 22d Day of December, A. D. 1922.

Investigation and Suspension Docket No. 1596

Intermediate Switching Charges at Peoria, Ill.

It appearing, That by order dated June 30, 1922, the commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules described in said order, and subsequently ordered that the operation of said schedules be suspended until November 28, 1922; and that the effective date of said schedules has been voluntarily postponed by respondent to February 1, 1923;

It further appearing, That a full investigation of the matters and things involved has been had, and that the commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the respondent herein be, and it is hereby, notified and required to cancel said schedules, on or before January 31, 1923, upon notice to this commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the interstate commerce act, and that this proceeding be discontinued.

No. 13110

Minneapolis & St. Louis Railroad Company

v.

Peoria & Pekin Union Railway Company

It appearing, That on April 13, 1922, the commission entered its report and order in the above case, and that on July 10, 1922, this case was reopened for further hearing;

It further appearing, That such further hearing and full investigation of the matters and things involved has been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the commission.

George B. McGinty, Secretary. (Seal.)

A True Copy. (Sgd.) George B. McGinty, Secretary. (Interstate Commerce Seal.)

[fol. 30] IN UNITED STATES DISTRICT COURT

TEMPORARY RESTRAINING ORDER—Filed August 6, 1924

Now on this 6th day of August, 1924, at 3:20 P. M. upon the presentation of the petition in the above entitled cause, asking for the issue of a temporary restraining order, it appearing to the court that the petitioners will suffer irreparable damage by interruption of traffic if a restraining order is not issued,

It is therefore ordered that the defendant be and it is hereby, until the further order of this court, enjoined and restrained from refusing to receive cars, either loaded or empty, delivered or offered for delivery by W. H. Bremner as receiver of The Minneapolis & St. Louis Railroad Company, his agents and servants, for shipment to points on or beyond the lines of the Illinois Central Railroad Company, the Chicago, Peoria & St. Louis Railroad Company, the Chicago & Northwestern Railway Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the Lake Erie & Western Railroad Company, the Toledo, Peoria & Western Railroad Company, the Chicago & Alton Railroad Company and the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, and that said defendant, Peoria & Pekin Union Railway Company, its agents and servants, be enjoined and restrained from doing any act in violation of the order of the Interstate Commerce Commission dated April 13, 1922, directing that the discrimination resulting from the application of the Peoria & Pekin Union Railway tariff ICC No. 36, be removed.

[fols. 31-34] It is further ordered that the application of the petitioners for the issue of a temporary injunction herein be set down for hearing on the 12th day of August, 1924, at Iowa City at 10 o'clock A. M. and that service be made by serving upon the defendant a certified copy hereof. This order is made without notice on account of facts alleged showing that service will otherwise be interrupted on August 8th, 1924.

(Sgd.) Martin J. Wade, Judge of the U. S. District Court in and for the Southern District of Iowa.

[fol 35] IN UNITED STATES DISTRICT COURT

SPECIAL APPEARANCE OF DEFENDANT, AND MOTION TO QUASH SERVICE—Filed August 12, 1924

The Peoria & Pekin Union Railway Company, the defendant above named, hereby appears specially in the above entitled cause for the sole and only purpose of moving the Court to vacate, quash, and set aside service of summons or subpoena herein, to refuse the assumption of jurisdiction of the person of this defendant, as prayed in the bill, and to dismiss the defendant herefrom for the following reasons:

First. This Court has no jurisdiction of or over the defendant; nor has it been lawfully served or subpœnaed herein.

Second. The defendant is neither a citizen nor a resident of the State of Iowa nor a resident of the Southern District of said State. It was at the commencement of this suit and still is a corporation created by and organized under and pursuant to the laws of the State of Illinois, and not created by or organized under or pursuant to the laws of the State of Iowa, and it is a non-resident of such State and is not now doing nor has it ever done business therein, and in all respects exists and does business beyond the territorial jurisdiction of this Court.

Third. The railroad of this defendant, upon which the complainants demand the performance by the defendant of the several acts alleged in the bill, is located wholly within the Counties of Peoria and Tazewell in the State of Illinois and not in the State of [fol. 36] Iowa or any part thereof or within the Southern District of the State of Iowa or any Division thereof; that the defendant has no officers, agents or employees within said State of Iowa, the Southern District of said State or the Central Division of the Southern District thereof upon which service of summons or subpœna in chancery in this action can be had; nor has it been found or served therein.

Fourth. That the summons or subpœna in chancery in this case was issued in the Central Division of the Southern District of the State of Iowa and was made returnable in said Division and District, but was served or attempted to be served upon the Treasurer of the defendant in the County of Peoria in the State of Illinois—beyond the territorial jurisdiction of this Court, as will be and is shown by the return of the marshal thereon.

Fifth. That while it is pretended in said bill that it is for the enforcement of an order made by the Interstate Commerce Commission in a proceeding in which the Minneapolis & St. Louis Railroad Company was complainant, and that because thereof this Court has jurisdiction to subpœna the defendant and grant the relief prayed for; yet there is no such order as so pretended and for want thereof this Court may not lawfully assume such jurisdiction.

Sixth. The plaintiffs pretend in their said bill that it is for the enforcement of an order of the Interstate Commerce Commission alleged to have been entered in a cause pending before it, entitled, "The Minneapolis & St. Louis Railroad Company vs. Peoria & Pekin Union Railway Company," known as Docket No. 13110, and by such pretense of the subject-matter hereof obtained the said subpœna for this defendant and the restraining order granted herein, but the said bill with the Exhibits "A" and "B" thereto attached and made part thereof, show that the said cause of The Minneapolis & St. Louis Railway Company vs. Peoria & Pekin Union Railway Company formerly pending before the Interstate Commerce Commission and known upon the records of said Com-

mission as Docket No. 13110 was dismissed by the Interstate Commerce Commission without prejudice, long prior to the filing of said bill and in fact there is now no such order, as pretended in said [fol. 37] bill. Wherefore this Court is without power to acquire the pretended jurisdiction of this defendant or to compel it to perform the services demanded in the said bill.

Seventh. The bill prays that this defendant be enjoined and restrained from refusing to receive cars tendered by the petitioners, or either of them, for interchange to the tenants of the defendant, but this Court is without jurisdiction to so summons and restrain this defendant located and doing business as aforesaid, in the absence of an order of the Interstate Commerce Commission directing the performance of such acts by the defendant, and as appears from the said bill and the affidavit filed herewith there is no such order.

Eighth. The bill prays that the defendant may be enjoined and restrained from collecting or attempting to collect any charge against cars moving in interstate commerce, in violation of the order of the Interstate Commerce Commission, entered in the cause pending before it, entitled "The Minneapolis & St. Louis Railroad Company vs. Peoria & Pekin Union Railway Company," known as Docket No. 13110, but this Court is without jurisdiction of this defendant to either summons or restrain it in the absence of an order of said Commission, directing this defendant to perform such service, and as appears from the said bill and the affidavit filed herewith there is no such order.

Tenth. The bill also prays that the defendant be enjoined and commanded to cease and desist from practicing the unlawful and unjust discrimination against the petitioners found by the report of the Interstate Commerce Commission in said proceeding, but this Court is without jurisdiction of this defendant either to summons or enjoin it in the absence of an order of the Commission now in force, defining the extent of such discrimination and the steps to be taken by defendant for the removal thereof, and as appears from the said bill and the said affidavits filed herewith there is no such order.

[fol. 38] Eleventh. The said pretended order averred in the bill directs, in substance, the removal of certain alleged discriminations, but without direction of the manner of such removal or definition of the extent of such alleged discriminations, and the relief prayed in the said bill is not a service or act directed by the said pretended order, but is an attempt to have the Court originally define the act to be done to remove the alleged discriminations and to require performance of certain acts not directed by the said order. Wherefore, because of the character of such relief, this Court is without jurisdiction to summons or restrain this defendant, situated as aforesaid.

Twelfth. The said suit is neither for the enforcement of an order of the Interstate Commerce Commission now in force nor for any

relief pertinent to such alleged order within the power of this Court to determine, and because thereof the Court may not take jurisdiction of this defendant and its railroad situated as aforesaid.

Thirteenth. This Court has no jurisdiction to summons or enjoin this defendant, prayed for in the said petition, for the reason that it is only the Interstate Commerce Commission that can determine whether or not defendant has the right to charge the petitioners for services in connection with the interchange of cars, as set forth in the petition and to determine how much, if any, said charge should be, and without any determination of the question by the Interstate Commerce Commission this Court is wholly without jurisdiction to grant the said relief by assuming jurisdiction of this defendant situated as aforesaid. The said alleged order, made an Exhibit to said bill, shows that the said Interstate Commerce Commission held that the defendant is entitled to compensation for such services so rendered.

Fourteenth. The railroad of the defendant, upon which it is sought to compel it to perform the relief demanded, is entirely within the State of Illinois as aforesaid and in no other place, and the said injunction, if any shall be issued, will not operate and cannot operate in the State of Iowa or in the Southern District thereof or in the [fol. 39] Central Division of the Southern District thereof, but entirely outside thereof, and will require performance physically done beyond the territorial jurisdiction of this Court, which, in the absence of an order of the Interstate Commerce Commission directing the defendant to perform the said acts, this Court is without power to require from this defendant located and a resident as aforesaid. It appears from the said bill and the affidavit filed herewith that there is no such order.

Fifteenth. This Court has no jurisdiction of the subject-matter of the controversy alleged in said bill and because thereof cannot acquire jurisdiction of the person of this defendant situated as aforesaid.

Sixteenth. The said bill or petition does not state a cause of action against this defendant within the jurisdiction of this Court and hence this Court may not assume control of this defendant by a subœna or restraining order.

In support of the foregoing motion the defendant submits herewith the attached affidavit, marked Exhibit "A," which for reference is made part hereof.

Peoria & Pekin Union Railway Company, by (Sgd.) J. M. Elliott, (Sgd.) E. C. Craig, (Sgd.) R. V. Fletcher, Its Solicitors.

Duly sworn to by R. V. Fletcher. Jurat omitted in printing.

[fol. 40] EXHIBIT "A" TO SPECIAL APPEARANCE OF DEFENDANT AND MOTION TO QUASH SERVICE

STATE OF ILLINOIS,
County of Cook, ss:

V. V. Boatner, being first duly sworn upon oath, states that he is President of the Peoria & Pekin Union Railway Company, the defendant in the above entitled cause, and that he has read the motion to which this affidavit is attached, and this affiant states that he is familiar with the matters and facts therein set forth, and knows the same to be true in substance and in fact.

This affiant further states that the Peoria & Pekin Union Railway Company is a resident and citizen of the State of Illinois, and is not a resident or citizen of the State of Iowa, or of the Southern District of Iowa, or of the Central Division of the Southern District of Iowa; that the defendant was, at the commencement of this suit, and still is, a corporation created by and organized under and pursuant to the laws of the State of Illinois, and was not created by or organized under or pursuant to the laws of the State of Iowa, and that it is a non-resident of such state; that as a non-resident of such state it does not now have and did not have at the time this suit was commenced, or at any time prior thereto, any officer or agent or employe in the State of Iowa, or the Southern District of the State of Iowa, or the Central Division of the said Southern Division of the State of Iowa, and that it did not at or prior to the commencement of this suit, at any time subsequent thereto nor at the present time, own or operate any railroad in the State of Iowa, the Southern District of the State of Iowa, or the Central Division of the said Southern District of the State of Iowa; that it has no place of business in the State of Iowa, nor in the Southern District of the State of Iowa, nor in the Central Division of the Southern District of the State of Iowa, nor has it ever conducted any business of any kind, nature or description therein; and that the subpoena in chancery issued in this case was served upon the Treasurer of the Peoria & Pekin Union Railway Company at Peoria, Illinois, and not otherwise.

[fol. 41] This affiant further states that the Peoria & Pekin Union Railway Company operates exclusively within the Counties of Peoria and Tazewell, in the State of Illinois, and operates at no other place or places; that on or about August 26, 1921, the Peoria & Pekin Union Railway Company filed with the Interstate Commerce Commission its tariff known as I. C. C. Tariff No. 36, by the terms of which it was provided that a charge of $4.00 per car would be imposed against The Minneapolis & St. Louis Railroad Company on all cars delivered to it for movement to other railroads in Peoria, with which the Peoria & Pekin Union Railway Company connected, and also upon all cars delivered by such other railroads to the Peoria & Pekin Union Railway Company for movement to The Minneapolis & St. Louis Railroad Company in interchange.

This affiant further states that in order that the Court may under-

stand the history of this tariff and the reason why it was filed, this affiant sets out the following: Prior to April 1, 1921, the Minneapolis & St. Louis Railroad Company and its predecessor, the Iowa Central Railroad Company, had a contract with defendant, under the terms of which contract defendant performed a switching service for The Minneapolis & St. Louis Railroad Company on all cars delivered by The Minneapolis & St. Louis Railroad Company to defendant for further movement beyond Peoria, Illinois; that for the service performed by defendant in the interchange of these cars The Minneapolis & St. Louis Railroad Company paid a charge determined under the contract which was precisely the same charge which was paid by all other railroads employing the services of defendant under similar contracts; that for a period of about forty years prior to April 1, 1921, The Minneapolis & St. Louis Railroad Company and its predecessor, the Iowa Central Railroad Company, paid a contract charge to defendant for services performed by it for these companies respectively; that prior to April 1, 1921, The Minneapolis & St. Louis Railroad Company served a notice upon defendant that effective April 1, 1921, The Minneapolis & St. Louis Railroad Company would cease to be bound by the terms of the contract and would cease to pay any sum whatever to the defendant for the services performed by defendant in switching and transferring cars between The Minneapolis & St. Louis Railroad Company, [fol. 42] and other railroad companies reaching Peoria; that thereupon the defendant told The Minneapolis & St. Louis Railroad Company that it could not continue to perform services for it without compensation and that from and after a certain date named in the notice, which was a reasonable time from and after the date of the notice, it, the defendant, would decline to switch cars to and from The Minneapolis & St. Louis Railroad Company from and to other carriers at Peoria without compensation; that thereupon The Minneapolis & St. Louis Railroad Company filed its certain bill of complaint in the District Court of the United States in and for the Southern District of Illinois to compel the defendant to perform the same services as is sought to compel it to perform in this proceeding; that the Peoria & Pekin Union Railway Company and all other railroads having contracts or arrangements with the Peoria & Pekin Union Railway Company were made parties defendant to this bill; that the answer of the Peoria & Pekin Union Railway Company was duly filed; that thereupon the case came on to be heard on bill and answer briefs, and thereupon the Court being advised in the premises, entered a decree; that by the terms of this decree the bill in question was dismissed for lack of jurisdiction and for lack of equity and the decision of the Court became final; that from this decision no appeal was prosecuted by The Minneapolis & St. Louis Railroad Company.

This affiant further states that after the filing of the said bill by The Minneapolis & St. Louis Railroad Company in the United States District Court in and for the Southern District of Illinois, the attention of the Interstate Commerce Commission was directed to the

controversy and the then Chairman of the Interstate Commerce Commission, Honorable Edgar E. Clark, advised defendant orally and in writing that defendant should file a tariff covering the charge which it desired to make against The Minneapolis & St. Louis Railroad Company for services performed by defendant for said The Minneapolis & St. Louis Railroad Company; that in accordance with the suggestions of the Interstate Commerce Commission defendant filed with the Commission what is known as a Sixth Section Application, seeking authority to file a tariff upon less than statutory notice, and in fact upon a notice to the interested parties and to the [fol. 43] public of not more than one day; that thereupon the Interstate Commerce Commission, in accordance with the request of said petition, granted its Sixth section permission authorizing defendant to file the said tariff upon one day's notice; that by the terms of this tariff, The Minneapolis & St. Louis Railroad Company was required to pay the $4.00 per car for each car moved by defendant between The Minneapolis & St. Louis Railroad Company and other railroads operating in Peoria; that defendant shows that as soon as the tariff became effective The Minneapolis & St. Louis Railroad Company began to pay, and continued to pay until January 2, 1923, the tariff charge there stated, namely, $4.00 a car for each car moved from The Minneapolis & St. Louis Railroad Company by defendant to other railroad companies with which rails the rails of defendant connected; that defendant shows, therefore, that for a period of about one year and four months The Minneapolis & St. Louis Railroad Company recognized the force, effect and validity of this tariff and paid to defendant the $4.00 charge thereby imposed for traffic handled by defendant for the account of The Minneapolis & St. Louis Railroad Company.

This affiant further states that The Minneapolis & St. Louis Railroad Company filed with the Interstate Commerce Commission its petition alleging that the said Tariff No. 36 was unjustly discriminatory and unduly prejudicial against The Minneapolis & St. Louis Railroad Company.

This affiant further states that petition was docketed in the records of the Interstate Commerce Commission as Docket 13110 and was entitled " The Minneapolis & St. Louis Railroad Company vs. Peoria & Pekin Union Railway Company"; that the cause was heard and that on April 13, 1922, the Commission filed its report and order, a copy of which is attached to the petition; that defendant has not cancelled the Tariff No. 36, and this affiant states that this tariff is in full force and effect, and that by the report and order of the Commission, bearing date of December 22, 1922, the defendant was ordered to cancel its Tariff No. 40, but no order was made by the Interstate Commerce Commission in that proceeding requiring defendant to cancel its Tariff No. 36 so that said tariff [fol. 44] remains in full force and effect, notwithstanding the order and report of the Interstate Commerce Commission bearing date of December 22, 1922; that on the other hand the order of the Commission in this proceeding bearing date of December 22, 1922, provided that the complaint of The Minneapolis & St. Louis Railroad

Company in Docket No. 13110 should be, and it was thereby dismissed as will appear from and examination of the order of the Commission as shown in said Exhibit "B" to the bill of complaint filed in this case.

This affiant further states that if the complaint of The Minneapolis & St. Louis Railroad Company in docket No. 13110 was thus dismissed, the order of April 22, 1922, which the bill in this case seeks to enforce was necessarily dismissed, annulled, set aside and held for naught, and that there is no order of the Interstate Commerce Commission which this Court can enforce in this proceeding.

This affiant further states that the defendant has violated no order of the Interstate Commerce Commission; he admits that it is insisting that it will not perform service in the movement of cars from the rails of the Minneapolis & St. Louis Railroad Company, operated by its Receiver, to the rails of other carriers without receiving compensation therefor as provided for in the said Tariff 36, which is still in effect; he denies, however, that the collection of such a charge would be an unlawful violation of the orders of the Interstate Commerce Commission and alleges that no such order is in existence and states that in the absence of such an order this Court is without jurisdiction to determine whether the imposition and collection of such a charge would be discriminatory on the ground that a similar charge is not made against other railroads.

(Signed) V. V. Boatner.

STATE OF ILLINOIS,
County of Cook, ss:

Subscribed and sworn to before me, a Notary Public in and for the above named County and State, this 11th day of August A. D., 1924; and I certify that I am authorized under the laws of the State of Illinois to administer oaths. (Signed) Frank S. Cerny. My commission expires Oct. 5, 1925. (Seal.)

[fol. 45] IN UNITED STATES DISTRICT COURT

ORDER FOR TEMPORARY INJUNCTION—Filed August 12, 1924

This day this cause came on to be heard on the petition, exhibits and the motion of plaintiffs for a temporary injunction, and also came the defendant and filed a special appearance and motion to quash the summons issued in this cause and to dismiss the petition on the ground that the court is without jurisdiction, and the plaintiff having applied to the court for permission to file as Exhibit C to their petition a certain order of the Interstate Commerce Commission bearing date January 8th, 1923, which was allowed by the court over the objection of the defendant, to which action of the court the defendant excepted, and the court having heard the argu-

ments of counsel, and being of the opinion that the statuts quo should be preserved pending a further hearing by the court,

It is ordered that a temporary injunction issue enjoining and restraining defendant from doing any act in violation of the order of the Interstate Commerce Commission dated April 13, 1922, in the case of Minneapolis & St. Louis Railroad Company vs. Peoria & Pekin Union Railway Company, Docket No. I. C. C. 13110, which is alleged in the petition to be still in effect. This temporary injunction is ordered to be issued without determination by the court [fol. 46] of the question of jurisdiction raised by the defendant in its special appearance and motion, all questions raised by such motion being expressly reserved.

Leave is expressly granted to the defendant to file a motion to dissolve the injunction herein ordered not later than September 20, 1924. Provided such motion is filed the time for hearing such motion is hereby fixed at ten o'clock A. M., September 25, at Des Moines, Iowa. Upon such hearing the defendant may present its objections to the jurisdiction and arguments in support thereof and shall not be required to file its answer until its motion to dismiss on the ground of lack of jurisdiction and other preliminary motions are heard and disposed of. It is further ordered that upon such hearing the plaintiff shall have the right to make such proper record as it desires which may not have been made on this date.

It is ordered that the injunction issue upon condition that the plaintiffs file within five days from this date a bond in the sum of Thirty Thousand Dollars ($30,000) payable to the defendant with National Surety Company, or some other surety company authorized under the laws of Iowa to execute bonds, as surety, conditioned that in the event it be determined that the injunction was improperly issued herein the above named complainants shall pay to the Peoria & Pekin Union Railway Company all damages which it may sustain, and shall pay to the Peoria & Pekin Union Railway Company the charges accruing on all freight cars delivered to it for interchange to its tenants during the period the injunction is in force, in accordance with the findings of the Interstate Commerce Commission in the proceeding now pending before it known as Docket No. 14534, or by a court of competent jurisdiction without prejudice, however, to the right of the complainants, or either of them, to recover from the Peoria & Pekin Union Railway Company the amount of such payments, or any part thereof as shall be found by the Interstate Commerce Commission, or by the courts, to be unlawful; or in the event the Interstate Commerce Commission [fol. 47] fails to render its decision in the above proceeding on or before the 15th of December, 1924, then, and in that event the complainant above named will pay to the Peoria & Pekin Union Railway Company, in accordance with the terms of said tariff, I. C. C. No. 36, $4.00 for each freight car, loaded or empty, delivered from the line of the Minneapolis & St. Louis Railroad Company to the Peoria & Pekin Union Railway Company for interchange to its tenants during the period of the injunction, without prejudice, however, to the rights of the complainant, or either of them, to

recover from the Peoria & Pekin Union Railway Company the amount of such payments, or any part thereof, in the event that the commission or the courts shall ultimately determine that said tariff is not in effect or that the charges therein named are unreasonable or otherwise unlawful.

If the bond herein above provided is not filed with the Clerk of this court within five days of this date the said injunction shall not issue.

Ordered this 12th day of August, 1924.

(Sgd.) Martin J. Wade, Judge.

[fols. 48-50] Bond on temporary injunction for $30,000, approved and filed August 14, 1924, omitted in printing.

[fol. 51] IN UNITED STATES DISTRICT COURT

MOTION TO DISSOLVE INJUNCTION—Filed September 17, 1924

And now comes Defendant, Peoria & Pekin Union Railway Company, and, pursuant to permission and authority granted to Defendant by order of this Honorable Court, entered in this cause at Iowa City, Iowa, on the Twelfth day of August, 1924, files this its Motion to dissolve the temporary injunction granted by this Honorable Court on the said Twelfth day of August, 1924, as shown in the said Order, the Defendant herein, expressly making this Motion by special leave of the Court, under its entry of special appearance, without entering a general appearance, which special entry of appearance was made for the purpose of moving to vacate, quash and set aside the service of summons or subpœna herein and for the purpose of objecting to the jurisdiction of this Court, this Motion to dissolve being made without entry of a general appearance, the Defendant herein expressly reserving its right to object and hereby objecting to the jurisdiction of the Court for all the reasons heretofore set out in Defendant's special entry of appearance and motion to quash, as shown by the records of this Court, and as if the said motion were now being presented to the Court.

For grounds of Motion to dissolve the injunction, Defendant shows forth the following:

1. The injunction heretofore granted in this case was improvidently granted.

2. This Court was without jurisdiction to entertain the petition [fol. 52] filed by Plaintiff in this case and was, therefore, without juridiction to grant the injunction.

3. This Court was without jurisdiction of the subject-matter set up in the said Petition filed by Plaintiffs in this case and was, therefore, without jurisdiction to grant the injunction.

4. This Defendant is a citizen and a resident of the State of Illinois, having its domicile in the City of Peoria, Peoria County, Illinois, and all its property and business are located wholly within the counties of Peoria and Tazewell in the State of Illinois, and it transacts no business of any kind in the State of Iowa, or in the Southern District of said State, or any division thereof, and the Defendant has no officers, agents or employes within the said State of Iowa, the Southern District of said State, or the Central Division of the Southern District thereof, and for this reason the Defendant cannot be sued without its consent elsewhere than in the State of Illinois and the Southern District of said State of Illinois. Defendant objects to being sued otherwise than in the State and District of its residence and the State and District where it is doing business, and for this reason this Court is without jurisdiction of the subject-matter of the said Petition filed by Plaintiffs in this cause, and this Court was, therefore, without jurisdiction to issue the said temporary injunction.

5. The Petition in this cause, while purporting to have this Court enforce an order of the Interstate Commerce Commission, seeks other and further relief than is appropriate to an enforcement of an order of the Interstate Commerce Commission, and this Court is wholly without jurisdiction to consider any matter in this cause except matters growing out of an order of the Interstate Commerce Commission. The injunction granted in this case enjoins and restrains Defendant from refusing to receive cars, either loaded or empty, delivered or offered for delivery, by W. H. Bremner, as Receiver of [fol. 53] the Minneapolis & St. Louis Railroad Company, his agents and servants, for shipments to points on or beyond the lines of railroads serving the Peoria, Illinois, district, whereas there is nothing in any order of the Interstate Commerce Commission which requires Defendant to receive and deliver such cars. Wherefore the injunction issued by this Honorable Court was made without jurisdiction of the subject-matter and was improvidently issued.

6. The injunction in this case purports to enjoin and restrain Defendant from violating an order of the Interstate Commerce Commission, whereas in truth and in fact there is no order of the Interstate Commerce Commission with reference to the subject-matter of the said Petition, and for this reason the injunction is void. No injunction should have been issued in this case for the reason that the Court is without jurisdiction, since the only jurisdiction which this Court could have would be to enforce an order of the Interstate Commerce Commission, whereas in truth and in fact there is no order of the Interstate Commerce Commission dealing with the subject-matter of the Petition, and, therefore, no order of the Interstate Commerce Commission which this Court can enforce. The alleged order which Plaintiffs seek to have enforced, even if it is in effect, which Defendant denies, has no reference whatever to the movement of cars and does not in any way require Defendant to receive and deliver cars to connections, the order in question being limited to a question of discrimination in the matter of rates, fares and charges. This Court, therefore, has no jurisdiction whatever to enjoin and restrain

Defendant with respect to acts which are not within the scope of the said order of the Interstate Commerce Commission and with which the said order does not deal.

7. The order of the Interstate Commerce Commission which Plaintiffs seek to enforce has been set aside by the Interstate Commerce Commission and is no longer in force and effect. This Court will have jurisdiction only for the purpose of enforcing an order of the [fol. 54] Interstate Commerce Commission, and since the said order has been set aside by the Interstate Commerce Commission, this Court was wholly without jurisdiction to grant an injunction in the premises or to give any other relief sought by the Petitioner.

For these and other reasons to be assigned at the hearing Defendant asks that the said injunction be dissolved, set aside and held for naught and that judgment be entered against Plaintiffs and sureties on the injunction bond executed by Plaintiffs, as required by the order of the Court, in such a sum as will represent the amount of damages which the Court may find that the Defendant has sustained by reason of the improvident and improper issuance of the said injunction.

And Defendant herein gives notice to the Plaintiffs and the surety upon the said injunction bond that it will, upon the hearing of this Motion, demand as damages for the improvident and improper issuance of the said injunction a sum which will represent a tariff charge of $4.00 per car for each car delivered to Defendant by the Minneapolis & St. Louis Railroad Company, or its Receiver, W. H. Bremner, for further transportation and delivery, to Cleveland, Cincinnati, Chicago St. Louis Railway Company, to Samuel M. Russell, as Receiver of the Toledo, Peoria & Western Railway Company, to the Illinois Central Railroad Company, to William Cotter, Receiver, Chicago Peoria & St. Louis Railroad Company, to the Peoria & Eastern Railway Company, to the Pennsylvania Railroad Company, to the Lake Erie & Western Railroad Company, to New York, Chicago & St. Louis Railroad Company, to Chicago & North Western Railway Company, to the Illinois Traction System and to William W. Wheelock and William G. Bierd, Receivers of the Chicago & Alton Railroad Company, form and after August 6, 1924, to the date of the hearing of this Motion, as well as all necessary solicitors' fees incurred by Defendant in connection with this cause, and other costs, [fols. 55-58] damages and expenses which may be shown at the hearing.

Respectfully submitted, W. S. Horton, E. C. Craig, Barnes, Magoon, Black & Horton, R. V. Fletcher, Solicitors for Motion.

Duly sworn to by V. V. Boatner. Jurat omitted in printing.

[fol. 59] IN UNITED STATES DISTRICT COURT

ANSWER—Filed November 24, 1924

And now comes Defendant, Peoria & Pekin Union Railway Company, and without waiving its right to object to the jurisdiction of this Honorable Court on the ground that Defendant is a resident citizen of the Southern District of Illinois and of the State of Illinois, and is not a resident citizen of the State of Iowa, or of the Southern District thereof, and without waiving the objections heretofore made by Defendant to the jurisdiction of this Court and to the venue of this action as set out in Defendant's motions to dismiss, but expressly reiterating and reaffirming the same, files this, its Answer to the petition filed against it in this case upon the understanding and with the express reservation that this Answer is filed under protest after Defendant's motions to dismiss have been overruled and due exception thereto taken by Defendant.

1. Defendant reiterates in this Answer its objection to the jurisdiction of this Court and its objection to being sued in the Southern District of Iowa on the grounds stated in the said motion. Defendant shows that it is a resident citizen of Illinois and that its principal place of business is in the City of Peoria, Illinois, in the Southern District of Illinois; it shows that it has no line of railroad in the [fol. 60] State of Iowa; that it transacts no business of any character in the State and that it may not be sued in the State of Iowa by the Plaintiffs upon any cause of action except a cause of action which is brought for the express purpose of enforcing an order of the Interstate Commerce Commission made upon the petition of the Plaintiffs. The Defendant objects to being sued in the State of Iowa upon the cause of action attempted to be stated in the petition for the reason that the said petition is not based solely upon an order of the Interstate Commerce Commission made upon the petition of the Plaintiff. The petition in this case, filed by Plaintiffs, seeks other further and different relief than is properly involved in a suit to enforce an order of the Interstate Commerce Commission Defendant insists, therefore, that this court is without jurisdiction of this particular suit and Defendant, having objected to the jurisdiction of this Court, and having objected to being sued in this Court upon the cause of action stated in the petition, which objections have been overruled by this Court, and exception duly taken by Defendant, files this, its Answer, by leave of the Court, expressly reserving all benefit of objection to the jurisdiction of the Court and to the venue of this suit, and submitting itself to the jurisdiction of this Court under protest, and without waiving any of its right to object to said jurisdiction.

2. Defendant points out in this Answer, which is filed under protest, as it has already pointed out by its several motions to dismiss, which have been overruled and exception taken, that the petition in this case seeks not only to enforce an order of the Commission, but

seeks further to have this court enter an order requiring the Defendant to receive cars tendered by the petitioners, or either of them, whereas the order of the Commission which is made an exhibit to the bill, has no reference whatever to the movement of cars and does not in any way enjoin upon the Defendant the duty of receiving [fol. 61] cars and delivering them to the connections of the petitioners, the order of the Commission being limited to a question of discrimination in the matter of rates, fares and charges. Defendant shows that the bill in this case sets out alleged facts which have nothing to do with the order of the Commission and the bill prays for relief which is beyond the scope of the said order of the Commission. Therefore, the bill seeks in this suit to secure relief which is beyond the scope of the order of the Commission and with which the order of the Commission has nothing to do. The Defendant asserts that this Court has no jurisdiction of a bill of this character and that the Defendant may not be sued in the State of Iowa on this particular cause of action.

3. Defendant shows further that this Court is without jurisdiction for the reason that it affirmatively appears on the face of the bill filed in this case and the exhibits attached thereto and made a part of the bill that the order of the Interstate Commerce Commission relied on in this bill and herein sought to be enforced is no longer in effect for the reason that the Commission by its order of December 22, 1922, as shown in Exhibit B to the bill in this case, dismissed the complaint in Case No. 13110, entitled Minneapolis & St. Louis Railroad Company v. Peoria & Pekin Union Railway Company, and by such act of the Commission in dismissing the complaint, the order relied on in this case was necessarily dismissed and set aside and is no longer in existence. Defendant asserts that this Court has no jurisdiction of any suit against Defendant, except a suit to enforce an order of the Interstate Commerce Commission, and since it appears on the face of the bill that no order of the Interstate Commerce Commission is now in existence affecting the subject-matter of the suit, this Court is without jurisdiction. Defendant objects to being [fol. 62] sued in the State of Iowa, a state other than the state of its residence, in a cause of action which is not based upon an order of the Interstate Commerce Commission, since in fact no such order is in existence, and it shows that it has entered its objection on this ground under special appearance for the purpose of objecting to the jurisdiction and to the venue, and its objection having been overruled and exception duly taken, it reserves this point and files this Answer upon the understanding and with the reservation that by doing so it has waived none of its rights to object to the jurisdiction of the Court and to the venue of this suit.

4. The Defendant, answering so much of the averments of the bill as it is advised are pertinent and relevant, admits that the Minneapolis & St. Louis Railroad Company is a corporation organized and existing under the laws of the State of Iowa, with its principal place of business in the City of Des Moines, Iowa, and admits that

the said Minneapolis & St. Louis Railroad Company is a citizen and resident of the State of Iowa and of the Southern District thereof. Defendant further admits that W. H. Bremner is the duly appointed Receiver, operating the property of the said Minneapolis & St. Louis Railroad Company under authority of the District Court of the United States for the districts of Minnesota and Illinois.

5. Defendant further admits that Peoria & Pekin Union Railway Company is a corporation organized under the laws of the State of Illinois, with its principal place of business in the City of Peoria, Illinois, and is a citizen and resident of said state.

6. Defendant denies, however, that this is an action arising under an Act to Regulate Commerce and acts amendatory thereof, and denies that this action arises under the District Court Jurisdictional Act, denies that this is in fact a suit to enforce an order of the Interstate Commerce Commission and denies that jurisdiction to [fol. 63] entertain this suit is vested in this Honorable Court.

7. Defendant admits that W. H. Bremner, Receiver of the property of the Minneapolis & St. Louis Railroad Company, is operating the railroad property as a common carrier of freight and passengers, and admits that it, the Defendant, is a common carrier, and admits that both the Plaintiffs and the Defendant are subject to the Interstate Commerce Act, which is referred to in the bill in this case as the Act to Regulate Commerce. Defendant admits that it and the Plaintiffs are subject to the lawful orders and regulations of the Interstate Commerce Commission.

8. Defendant admits that it was organized in October, 1880, as a corporation, and admits that it is a common carrier engaged in the transaction of a general railroad business, particularly the business of performing switching and terminal operations at Peoria, Illinois. It denies, however, that it was organized by certain railway companies, but on the contrary it avers that it was organized under the general railroad incorporation law of the State of Illinois by certain individuals, to-wit, Solon Humphreys, A. L. Hopkins, George L. Bradbury, John B. Cohrs and C. R. Cummings. Defendant asserts that since the date of its incorporation continuously to the present time it has been engaged in a general railroad business, particularly, as stated, in doing switching and terminal work. Defendant denies that it was organized for the purpose of consolidating the terminals and terminal facilities of other railroad companies and to provide a means for the joint operation of the terminal facilities thereof. This Defendant asserts that it is an independent railroad company vested with all the power and exercising all the functions of any other railroad company, and is a common carrier subject to the Interstate Commerce Act. Defendant shows that it files tariffs with the In- [fol. 64] terstate Commerce Commission as to all interstate rates, fares, charges and practices, and that it files tariffs with the Illinois Commerce Commission as to all purely intrastate rates, fares, charges and practices.

9. Defendant admits that at the present time its capital stock is owned by the Illinois Central Railroad Company, Chicago, Peoria & St. Louis Railroad Company, Chicago & North Western Railway Company, Cleveland, Cincinnati, Chicago & St. Louis Railway Company, New York, Chicago & St. Louis Railroad Company, (misnamed in the bill, "Lake Erie & Western Railroad Company") and the Toledo, Peoria & Western Railway Company. Defendant denies, however, that these companies are the successors in interest of any railroad companies which organized the Defendant.

10. The Defendant admits that it has in effect certain contracts with certain of the aforesaid companies which own stock of Defendant, but it denies that the contracts have the force and effect stated in the petition. Defendant states that at the present time it has no formal contract with the Chciago & Alton Railroad Company nor with the Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company; Defendant shows that it formerly had formal contracts with these companies but these contracts have long since expired. The property of the Chicago & Alton Railroad Company is not operated by the company but is operated by the Receivers, William W. Wheelock and William G. Bierd, with whom Defendant has an operating arrangement along the general lines of the contract which it has with other companies. At the present time Defendant has formal contracts only with the Illinois Central Railroad Company, Toledo, Peoria & Western Railway Company and Receiver, Cleveland, Cincinnati, Chicago & St. Louis Railroad Company and the Chicago, Peoria & St. Louis Railroad Company and its Receiver. All the other contracts have expired. The Defendant states that all these contracts are similar in terms but in order that the Court may understand the [fol. 65] purport of such contracts reference is made to the contract with four certain railroad companies, predecessors in title of the Chicago, Peoria & St. Louis Railroad Company, Toledo, Peoria & Western Railroad Company, Illinois Central Railroad Company, and the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company, a copy of which is made a part hereof, marked Exhibit "a". Defendant shows that these contracts speak for themselves and they are referred to herein as showing what rights Defendant has under the contracts and what rights have been given to the several contracting parties.

11. Defendant admits that the tracks of the Minneapolis & St. Louis Railroad Company now being operated by its Receiver, enter the City of Peoria and connect with the tracks of the Defendant at a point within the City of Peoria. Defendant denies, however, that the track of Defendant which connects with the tracks of the Plaintiff is such a track as tenants of Defendant have a right to use under the terms of the said contract. Defendant asserts on the contrary that nobody has the right to use the tracks of the Defendant for the purpose of switching and interchanging cars except Defendant.

12. Defendant admits that the Chicago, Rock Island & Pacific Railway Company and the Chicago, Burlington & Quincy Railroad

Company have lines of railroad extending into the City of Peoria, the tracks of each of which connect with the tracks of Defendant in the said city, but Defendant denies that the companies with which Defendant has contracts, under the contracts, or otherwise, have the right to use any of the tracks of the Defendant for the switching and interchange of cars between railroads, and asserts that no railroad with which Defendant has contracts has the right to receive cars interchanged with the Chicago, Rock Island & Pacific Railroad Company and the Chicago, Burlington & Quincy Railroad Company upon any tracks of Defendant.

[fol. 66] 13. Defendant admits that on or about August 26, 1921, Defendant filed with the Interstate Commerce Commission its tariff known as I. C. C. Tariff No. 36, by the terms of which it was provided that a charge of $4.00 per car would be imposed against the Minneapolis & St. Louis Railroad Company on all cars delivered to it, the Defendant, for movement to other railroads in Peoria with which Defendant connected and also upon all cars delivered by such other railroads to Defendant for movement to the Minneapolis & St. Louis Railroad Company in interchange.

In order that the Court may understand the history of this tariff and the reason why it was filed, Defendant sets out the following: Prior to April 1, 1921, the Minneapolis & St. Louis Railroad Company, and its predecessor, the Iowa Central Railroad Company had a contract with Defendant similar to the contract heretofore referred to, and made Exhibit A to this Answer. Under the terms of this contract Defendant performed a switching service for the Minneapolis & St. Louis Railroad Company on all cars delivered by the Minneapolis & St. Louis Railroad Company to Defendant for further movement beyond Peoria, Illinois. For the service performed by Defendant in the interchange of these cars Minneapolis & St. Louis Railroad Company paid a charge determined under the contract which was precisely the same charge which was paid by all other railroads employing the services of Defendant under similar contracts. For a period of about 40 years prior to April 1, 1921, Minneapolis & St. Louis Railroad Company and its predecessor, the Iowa Central Railroad Company, paid a contract charge to Defendant for services performed by it for these companies respectively. Prior to April 1, 1921, Minneapolis & St. Louis Railroad Company served a notice upon Defendant that effective April 1, 1921, Minneapolis & St. Louis Railroad Company would cease to be bound by the terms of the contract and would cease to pay any sum whatever to [fol. 67] the Defendant for the services performed by Defendant in switching and transferring cars between the Minneapolis & St. Louis Railroad Company and other railroad companies reaching Peoria. Shortly thereafter the Defendant told the Minneapolis & St. Louis Railroad Company that it could not continue to perform services for it without compensation and that from and after a certain date named in the notice, which was a reasonable time from and after the date of notice, it, the Defendant, would decline to switch cars to and from the Minneapolis & St. Louis Railroad Com-

pany from and to other carriers at Peoria without compensation. Thereupon the Minneapolis & St. Louis Railroad Company filed its certain bill of complaint in the District Court of United States in and for the Southern District of Illinois, as shown by certified copy of said bill, a copy of which is made a part hereof and marked Exhibit B. The Peoria & Pekin Union Railway Company and all other railroads having contracts or arrangements with the Peoria & Pekin Union Railway Company were made parties Defendant to this bill. The Answer of the Peoria & Pekin Union Railway Company was duly filed and a certified copy of this Answer is made a part hereof and marked Exhibit C. Thereupon the case came on to be heard on bill and answer, and the Court being advised in the premises, entered a decree, a duly certified copy of which is made a part hereof and marked Exhibit D. By the terms of this decree the bill in question was dismissed for lack of jurisdiction and for lack of equity and the decision of the court became final. From this decision no appeal was prosecuted by the Minneapolis & St. Louis Railroad Company. Defendant shows, therefore, that the matters and things expressly charged, litigated and decided in this proceeding cannot be relitigated in this or any other suit since the decree of the Honorable District Court of the Southern District of Illinois is res adjudicata and is conclusive upon all issues involved in that [fol. 68] proceeding. Defendant shows that it appears from the averments of the bill in this case many of the issues involved in this case were raised and decided in the case brought in the Southern District of Illinois and these issues cannot be again tried in this proceeding. Defendant pleads the existence of this decree as being res adjudicata.

Defendant further shows that after the filing of the said bill by the Minneapolis & St. Louis Railroad Company in the United States District Court in and for the Southern District of Illinois, the attention of the Interstate Commerce Commission was directed to the controversy and the then Chairman of the Interstate Commerce Commission, Honorable Edgar E. Clark, advised Defendant orally and in writing that Defendant should file a tariff covering the charge which it desired to make against the Minneapolis & St. Louis Railroad Company for services performed by Defendant for said Minneapolis & St. Louis Railroad Company. The written suggestion of the Chairman of the Interstate Commerce Commission to this effect is made a part hereof and marked Exhibit E.

In accordance with the suggestion of the Chairman of the Interstate Commerce Commission, Defendant filed with the Commission what is known as a Sixth Section Application, seeking authority to file a tariff upon less than statutory notice, and in fact upon a notice to the interested parties and to the public of not more than one day. Copy of the application for special permission to file this tariff on less than statutory notice is made a part hereof and marked Exhibit F.

Thereupon the Interstate Commerce Commission, in accordance with the request of said petition, granted its Sixth Section permission authorizing Defendant to file the said tariff upon one day's notice.

A copy of the order of the Commission so authorizing the filing of this tariff which was to become effective on or about August 25, 1921, [fol. 69] 1921, I. C. C. Tariff No. 36, referred to in the bill in this case, is made a part hereof and marked Exhibit G, together with a copy of said Tariff I. C. C. 36, Exhibit G-1.

By the terms of this tariff, Minneapolis & St. Louis Railroad Company was required to pay $4.00 per car for each car moved by Defendant between the Minneapolis & St. Louis Railroad Company and other railroads operating in Peoria. Defendant shows that as soon as the tariff became effective, Minneapolis & St. Louis Railroad Company began to pay and continued to pay until January 2, 1923, the tariff charge there stated, namely, $4.00 a car for each car moved from the Minneapolis & St. Louis Railroad Company by Defendant to other railroad companies with which rails the rails of Defendant connected. Defendant shows, therefore, that for a period of about one year and four months the Minneapolis & St. Louis Railroad Company recognized the force, effect and validity of this tariff and paid to Defendant the $4.00 charge thereby imposed for traffic handled by Defendant for the account of Minneapolis & St. Louis Railroad Company.

14. Defendant admits that Minneapolis & St. Louis Railroad Company filed with the Interstate Commerce Commission its petition alleging that said tariff was in violation of law in that, among other things, it failed to provide a similar charge upon cars interchanged between the Chicago, Rock Island & Pacific Railway Company and Chicago, Burlington & Quincy Railroad Company on the one hand and other railroads companies operating in Peoria on the other hand, and on the ground that the said tariff No. 36 was unjustly discriminatory and unduly prejudicial against the Minneapolis & St. Louis Railroad Company. Defendant asserts, however, that no petition of this character was filed by W. H. Bremner, as Receiver of the Minneapolis & St. Louis Railroad Company, the only party making the complaint being the Minneapolis & St. Louis Railroad [fol. 70] Company. Defendant points out, therefore, that the Receiver, W. H. Bremner now operating the railroad of the Minneapolis & St. Louis Railroad Company, and one of the parties to this suit, was not a party to this or any other proceeding pending before the Interstate Commerce Commission. The said Bremner has never been made a party to any such proceeding so far as Defendant is advised.

15. Defendant admits that the petition was docketed in the records of the Interstate Commerce Commission as Docket No. 13110 and was entitled Minneapolis & St. Louis Railroad Company versus Peoria & Pekin Union Railway Company. Defendant admits that the cause was heard and that on April 13, 1922, the Commission filed its report and order, which report and order is Exhibit A to the bill in this case. Defendant refers to the report and order for a true statement of its scope and terms. Defendant shows that by the said report and by the order entered in this cause which refers to the

said report and makes the report part of the order, it was found that the Defendant was an independent common carrier, that it had a right to make charges for its services and that the Minneapolis & St. Louis Railroad Company was obliged under the law to pay to the Defendant a reasonable charge for each carload of traffic transported by Defendant from the rails of the Minneapolis & St. Louis Railroad Company to the rails of other carriers. The said report and order, however, found that if the charge was made against the Minneapolis & St. Louis Railroad Company by Defendant for this service, a similar charge of some amount should be made against the Chicago, Burlington & Quincy Railroad Company and the Chicago, Rock Island & Pacific Railroad Company. Defendant shows that the discrimination alleged in the Complaint and found by the Commission could be removed in one of two ways, the Defendant could cancel its tariff and make no charge whatever [fol. 71] against the Minneapolis & St. Louis Railroad Company, or if it preferred, it could file tariffs for similar charges against the Chicago, Burlington & Quincy Railroad Company and the Chicago, Rock Island & Pacific Railway Company. The Defendant shows that in accordance with its legal right it elected to remove the discrimination by filing tariffs which would impose similar charges upon the Chicago, Rock Island & Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company. Defendant shows that the order of the Interstate Commerce Commission and report made part of the order bearing date of April 13, 1922, in the said cause No. 13110 did not require Defendant to withdraw its tariff No. 36 or to cancel the same, and in fact Defendant shows that the Interstate Commerce Commission has never by any order required Defendant to withdraw or cancel said tariff, which tariff is still in full force and effect.

16. Defendant denies that it has failed to comply with the order of the Interstate Commerce Commission. It admits that it has not cancelled the Tariff No. 36 and asserts that this tariff is in full force and effect. It denies, however, the implication in the bill that there was anything in the order of the Interstate Commerce Commission requiring it, Defendant, to cancel said tariff. Defendant shows, however, that even if the order of the Commission should be construed as requiring it, Defendant, to cancel the said tariff, the fact that the said tariff has not in fact been cancelled has the effect under the law of leaving the said tariff in full force and effect and making the charge of $4.00 per car which Defendant seeks to collect from Plaintiff the proper lawful published charge which Defendant not only has the right to collect, but which it is the obligation of the Defendant to collect until the tariff shall have been cancelled in the way provided by law. Defendant admits, as has heretofore been stated, that it undertook to remove the discrimina- [fol. 72] tion by the publication of its Tariff I. C. C. No. 40, a copy of which is made a part hereof and marked Exhibit H, by the terms of which charges were sought to be imposed against the Chicago, Rock Island & Pacific Railway Company and the Chicago, Burling-

ton & Quincy Railroad Company on cars interchanged between said companies respectively and the other railroads operating in Peoria. Defendant admits that this tariff No. 40 was suspended by the Interstate Commerce Commission and that a hearing was had thereon. By the report and order of the Commission, Exhibit B to the Bill in this case, bearing date of December 22, 1922, the Defendant was ordered to cancel its Tariff No. 40, but no order was made by the Interstate Commerce Commission in that proceeding requiring Defendant to cancel its Tariff No. 36 so that said tariff remains in full force and effect, notwithstanding the order and report of the Interstate Commerce Commission bearing date of December 22, 1922. On the other hand, the order of the Commission in this proceeding bearing date of December 22, 1922, provided that the complaint of the Minneapolis & St. Louis Railroad Company in Docket No. 13110 should be, and it was thereby, dismissed, as will appear from an examination of the order of the Commission as shown in said Exhibit B to the bill of complaint filed in this case. Defendant asserts that if the complaint of the Minneapolis & St. Louis in Docket 13110 was thus dismissed, the order of April 22, 1922, which the bill in this case seeks to enforce was necessarily dismissed, annulled, set aside and held for naught. The Defendant shows, therefore, that there is no order of the Interstate Commerce Commission which this court can enforce in this proceeding.

Defendant here reiterates its challenge to the jurisdiction of this Court on the ground that since it appears from the bill and exhibits made a part of the bill that there is no order of the Inter-[fol. 73] state Commerce Commission now in effect, this court has no jurisdiction of Defendant and the bill should be dismissed for that reason as well as for other reasons set out in this answer.

17. In order that the Court may be fully advised as to the whole history of this transaction and all the features connected therewith, Defendant shows that on or about January 2, 1923, Minneapolis & St. Louis Railroad Company served a notice upon Defendant that it would no longer continue to pay the charge of $4.00 a car carried in the said tariff No. 36, nor would it pay any other sum whatever for such service and that from and after the date of the notice, it, the Minneapolis & St. Louis Railroad Company, would expect the Defendant to perform this service without charge for the Minneapolis & St. Louis Railroad Company. Defendant shows that upon receipt of this notice, it, the Defendant, notified Minneapolis & St. Louis Railroad Company that it, Defendant, would refuse to perform the service for the Minneapolis & St. Louis Railroad Company in view of the fact that the Minneapolis & St. Louis Railroad Company had asserted its intention not to pay the tariff charge or any other charge for this service and that from and after the date of the notice, the Defendant would refuse to move cars moving in through service from the Minneapolis & St. Louis Railroad Company to other railroads in and about Peoria. Thereupon the Minneapolis & St. Louis Railroad Company filed an in-

formal complaint with the Interstate Commerce Commission, a copy of which is found in Exhibit 1 in which complaint the Minneapolis & St. Louis Railroad Company asked the Interstate Commerce Commission to make an order under its emergency powers requiring Defendant to continue to perform said service. Thereupon the Interstate Commerce Commission on January 18, 1923, made and entered a certain service order known as Service Order [fol. 74] 37, a copy of which is found in Exhibit 1 to be hereafter referred to and attached. By the terms of this service order, which purported to have been entered by the Commission under and by virtue of the power conferred upon the Commission by Paragraph 15 of Section 1 of the Interstate Commerce Act and other appropriate provisions of the said act, the Commission, among other things, required Defendant to continue to interchange freight traffic between the Minneapolis & St. Louis and connecting carriers at the regularly established interchange points at and in the vicinity of Peoria, Illinois. This Service Order 37 was made without notice to Defendant. Thereupon Defendant filed its original bill in the United States District Court in and for the Southern District of Illinois seeking to have the said service order of the Interstate Commerce Commission set aside. Answers and motions to dismiss were filed by the United States, Interstate Commerce Commission and Minneapolis & St. Louis Railroad Company, and the cause came on regularly for hearing, and the application of the Defendant for a temporary injunction to restrain the Commission from enforcing the said service order was denied. Thereupon Defendant prosecuted an appeal to the Supreme Court of the United States from said order of the United States District Court in and for the Southern District of Illinois. The said Supreme Court, in due course, reversed and remanded the decision of the United States District Court in and for the Southern District of Illinois, holding that the Interstate Commerce Commission was wholly without jurisdiction and authority to make said Service Order 37. Upon the filing of the mandate of the Supreme Court of the United States in the office of the Clerk of the United States District Court in and for the Southern District of Illinois, a decree was entered annulling, cancelling and setting aside the said Service Order of the Interstate Commerce Commission. Subsequently by order of the Interstate Commerce Commission this said service order was cancelled. [fol. 75] A copy of the original bill, answers and all proceedings had in connection with the litigation growing out of the making of this service order and the effort to enforce the same are made a part hereof and marked Exhibit I. Defendant shows that throughout this litigation the contention was never made by the Minneapolis & St. Louis Railroad Company or its Receiver that Defendant was prohibited by any order of the Interstate Commerce Commission from collecting the $4.00 charge provided in the said Tariff 36 or that any action taken by Defendant in an effort to collect said charge was in violation of the Commission's Order of April 13, 1922, or any other order of the Interstate Commerce Commission other than the said invalid and illegal Service Order 37.

18. Defendant further shows that the Interstate Commerce Commission on October 14, 1924, since the filing of the Original Bill in this cause, has issued its report and opinion in its Docket No. 14534, a copy of which said report and opinion is hereto attached marked, Exhibit J, and is asked to be taken as a part of this Answer. The said report was made as a result of the General Investigation ordered by the Commission and referred to in the opinion and order which are made Exhibit B to the Bill of Complaint in this cause. Defendant shows that in this said report and opinion of the Interstate Commerce Commission, Exhibit J to this Answer, the Commssion expressly states that the Tariff I. C. C. 36 referred to in the Bill, is still in effect. Defendant shows that an examination of the said report and opinion, Exhibit J hereto, will disclose that Defendant has never violated any order of the Interstate Commerce Commission, and that no violation of such an order is involved in the proposition that the Defendant will not continue to switch cars for the Plaintiff without compensation. Defendant shows further that an inspection of the said latest report and opinion of the Commission discloses the fact that there is no order of the Commission now in effect which [fol. 76] this Court has any power to enforce and clearly demonstrates that this Court is without jurisdiction to proceed further in the premises.

19 Defendant shows that the said order of the Interstate Commerce Commission, bearing date of April 13, 1922, which is the foundation of this proceeding, and to enforce which this bill is filed, has nothing whatever to do with the switching of freight or the performance of any service whatever by Defendant. The order relates solely to the question of rates fares and charges carried in the said Tariff 36. The only order of the Interstate Commerce Commission which has been entered in connection with its controversy relating to service is the said Service Order 37 which was declared invalid by the Supreme Court of the United States. Defendant shows, therefore, that the said order of April 13, 1922, has no relation or bearing whatever upon the question of whether Defendant shall or shall not switch cars from the line of the Minneapolis & St. Louis Railroad Company operated by the said Receiver to other railroads. Whatever bearing it may have upon the question related only to the charge which was to be made for such service, which is a distinct and separate thing entirely from the performance of the service itself. Defendant shows that if the Minneapolis & St. Louis Railroad Company and its Receiver has the legal right to require Defendant to perform the said service and do the said switching, that right cannot be asserted in this proceeding, nor can the right be enforced in this Court. A proceeding of this kind could not be based upon the said order of the Interstate Commerce Commission, but would necessarily be predicated upon an assertion of rights under general law. A bill or petition for the purpose of asserting such rights could not be filed and prosecuted over the protest of the Defendant in any Federal Court except the District Court for the South-

ern District of Illinois, where Defendant resides and transacts all its [fol. 77] business.

20 Defendant denies that it has violated any order of the Interstate Commerce Commission It admits that it is insisting that it will not perform service in the movement of cars from the rails of the Minneapolis & St. Louis Railroad Company, operated by its Receiver, to the rails of other carriers without receiving compensation therefor, as provided for in the said Tariff 36, which is still in effect. It denies, however, that the collection of such a charge would be an unlawful violation of the orders of the Interstate Commerce Commission and alleges that no such order is in existence. In the absence of such an order, this Court is without jurisdiction to determine whether the imposition and collection of such a charge would be discriminatory on the ground that a similar charge is not made against other railroads.

21. Defendant shows that even if it be conceded that the said order of April 13, 1922, is still in effect, yet this order does not require Defendant to cancel the said Tariff 36, nor has the said tariff in fact ever been cancelled, but is now in full force and effect, without any objection or protest from the Interstate Commerce Commission.

22 Defendant admits that it has served notice upon the Minneapolis & St. Louis Railroad Company and its Receiver that it will not continue to switch cars tendered to it by the said Receiver in interchange to other railroads unless the said Receiver shall pay the tariff charge provided in the said Tariff 36, which is in all respects a lawful charge. Defendant denies however, that it has attempted to enforce the collection of any unlawful, unjust, or discriminatory charge against the petitioner.

23. Defendant alleges that the Minneapolis & St. Louis Railroad Company is wholly insolvent. As stated in the bill, its property is now in the hands of a Receiver acting under orders of the Honorable [fol. 78] District Court of United States for the District of Minnesota. Since the appointment of the said Receiver, he has been unable to pay operating expenses, as indicated in his reports to the Interstate Commerce Commission. If it should be ultimately determined either by the Interstate Commerce Commission or by the courts that the Minneapolis & St. Louis Railroad Company, or its said Receiver, is legally liable to pay Defendant said tariff charge, the Defendant would be unable, owing to the insolvency of the Minneapolis & St. Louis Railroad Company and the poor record of the Receiver, to collect the amount of its charges carried in the said tariff. Defendant shows that it has the legal right to demand the prepayment of its charges before the said switching service is performed, particularly in view of the insolvent condition of the petitioners and the fact that the petitioners have repeatedly asserted that they would pay nothing to Defendant for the said service.

23 Now having fully answered, Defendant prays hence to be dismissed with its reasonable costs.

Peoria & Pekin Union Railway Company, by V. V. Boatner.
(Sgd.) R. V. Fletcher and W. S. Horton. C. Leber.

[fols. 79 & 80] *Duly sworn to by V. V. Boatner. Jurat omitted in printing.*

[fol. 81] IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL PETITION—Filed November 24, 1924

To the Honorable District Court of the United States in and for the Southern District of Iowa:

Come now the above named Petitioners and, pursuant to the authority granted in the Order of this Court dated August 12, 1924, files this their Supplemental Petition.

The petitioners respectfully show to the Court that after the entry by the Interstate Commerce Commission of the Order referred to in the original Petition as Exhibit "B," which is entered in Investigation and Suspension Docket No. 1596, dated December 22, 1922, the Interstate Commerce Commission entered its certain Order known as Order No. 14534, a copy of which is hereto attached and marked Exhibit "C."

That in said Order it was provided that Docket No. 13110 and Investigation and Suspension Dockets No. 1596 and No. 1455 should be re-opened and consolidated with and made a part of the investigation ordered by said Order No. 14534.

And your petitioners further respectfully show to the Court that since the hearing and the issue of the Order for the temporary injunction herein, the Interstate Commerce Commission has filed its opinion in said general investigation pursuant to Order No. 14534, [fol. 82] said opinion being filed on October 14th, 1924, a copy of which is hereto attached, marked Exhibit "D."

Your petitioners further respectfully show to the Court that in the said report or opinion, Exhibit "D," the Interstate Commerce Commission has affirmed its finding of fact that the enforcement by the defendant of the provisions of its Tariff I. C. C. #36 constitutes an unlawful and unjust discrimination against traffic interchanged from or to the line of the Minneapolis & St. Louis Railroad Company.

Wherefore your petitioners pray as in their original Petition.

M. M. Joyce, Donald Evans, Solicitors for Petitioners.

Duly sworn to by Donald Evans. Jurat omitted in printing.

[fol. 83] EXHIBIT "C" TO SUPPLEMENTAL PETITION

Order

AT A GENERAL SESSION OF INTERSTATE COMMERCE COMMISSION HELD AT ITS OFFICE, IN WASHINGTON, D. C., ON THE 8TH DAY OF JANUARY, A. D., 1923.

No. 14534

RATES, REGULATIONS AND PRACTICES OF PEORIA & PEKIN UNION RAILWAY COMPANY AND CONNECTIONS AT PEORIA, ILL., AND NEARBY POINTS.

Investigation and Suspension Docket No. 1596

Intermediate Switching Charges at Peoria, Ill.

No. 13110

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY,

v.

PEORIA & PEKIN UNION RAILWAY COMPANY

Investigation and Suspension Docket No. 1455

Intermediate Switching Charges at Peoria and Pekin, Ill.

The Commission having under consideration the question of the lawfulness of the rates, regulations and practices of the Peoria & Pekin Union Railway Company and railroads with which it connects at and in the vicinity of Peoria, Ill.:

It is ordered, That the Commission upon its own motion enter upon an investigation into and concerning the lawfulness of the rates, charges, regulations and practices of the Peoria & Pekin Union Railway, and railroads with which it connects at and in the vicinity of Peoria, Ill., as applied to traffic to, from and via Peoria, Ill.; including the lawfulness of existing contracts between the Peoria & Pekin Union Railway and the so-called tenants of that railroad, also the lawfulness of existing joint rates via Peoria, and the divisions thereof, on traffic moving in connection with the Peoria & Pekin Union Railway, and the nature and extent of the facilities furnished and services rendered by any of the respondents to other of the respondents at or near Peoria, whether in make-up or break-up yards, spotting, intermediate or terminal service, or otherwise, including facilities furnished or services rendered in respect of traffic moving on combination rates which break at Peoria, and the compensation therefor as between the respondents; with a view to determining just

and reasonable individual and joint rates, charges, regulations, divisions and practices and requiring establishment thereof by order

It is further ordered, That the Peoria & Pekin Union Railway Company, Peoria Railway Terminal Company and W. G. Bierd and H. I. Battles, Receivers, The Minneapolis & St. Louis Railroad Company, Chicago, Burlington & Quincy Railroad Company, the Chicago, Rock Island & Pacific Railway Company, The Chicago & Alton Railroad Company and William W. Wheelock and William G. Bierd, Receivers, Toledo, Peoria & Western Railway Company and S. M. Russell, Receiver, Illinois Central Railroad Company, The Atchison, Topeka & Santa Fe Railway Company, The Lake Erie & Western Railroad Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Chicago Peoria & St. Louis Railroad Company and Bluford Wilson and William Cotter, Receivers, Chicago & North Western Railway Company, The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, and St. Louis, Springfield & Peoria Railroad Co. and they are hereby, made respondents to this proceeding; and that a copy of this order be served upon each of such respondents.

[fols. 84-91] It is further ordered, That Docket No. 13110 and Investigation and Suspension Dockets No. 1596 and No. 1455, be, and they are hereby, reopened, consolidated with and made a part of this investigation.

And it is further ordered, That the consolidated proceeding be, and it is hereby, assigned for hearing at the Great Northern Hotel, Chicago, Ill., on February 20, 1923, at ten o'clock before Examiner Gault.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 92] IN UNITED STATES DISTRICT COURT

STIPULATION SUBMITTING CAUSE UPON ISSUES PRESENTED FOR FINAL DETERMINATION—Filed July 28, 1925

This stipulation entered into between the plaintiffs and defendant is to the following effect:

Whereas, on this 28th day of July, 1925, this cause came on to be heard upon the original Bill, Special Entry of Appearance and Motion to Quash Service filed by the defendant upon the several Orders of the Court heretofore entered in this cause, and upon defendant's Motion to Dissolve the Injunction, which issues so presented were argued by counsel.

Now, therefore, it is stipulated and agreed as follows:

The cause having been taken under advisement by the Court, it is agreed that if the Special Entry of Appearance and Motion to Quash Service should be overruled, the defendant shall be considered

as having excepted thereto, which exception shall be considered as allowed by the Court, and, thereupon, the matter shall be taken and considered as if the defendant had filed its Motion to Dismiss, the original of which is attached to this Stipulation. In the event that the Court, upon full consideration, shall overrule the Motion to Dis- [fols. 93–99] miss, it shall be considered that the defendant has reserved all exception to the action of the Court in so overruling such Motion, and the exception shall be taken as allowed.

Thereupon, if the Court shall likewise overrule defendant's Motion to Dissolve the Injunction, defendant shall be considered as having made all due exception to such action of the Court, which exception shall be considered as allowed. In the event that all of such said Motions are overruled, the defendant shall be considered as having been given leave to file its Answer within ten days, which Answer, it is agreed, shall be identical with a certain document heretofore filed, marked "Answer," and which, by special leave, was to be taken and considered as an affidavit in support of the Motion to Quash Service and Dismiss Suit.

Thereupon, it is stipulated and agreed that the case shall be considered as submitted to the Court upon the issues presented for final determination.

(Sgd.) M. M. Joyce, (Sgd.) Donald Evans. (Sgd.) W. S. Horton, (Sgd.) E. C. Craig, (Sgd.) E. E. Horton, (Sgd.) R. V. Fletcher, Attorneys for Defendant.

[fol. 100] IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed August 21, 1925

This cause came on to be heard before the Court at Des Moines, Iowa, on the twenty-eighth day of July, 1925, upon the motions of the defendant, (1) to set aside the service of the summons or subpœna herein; (2) to dismiss the petition; (3) to dissolve the preliminary injunction heretofore granted; and upon the stipulation of the parties that if said motions shall be denied the issues herein be finally determined. M. M. Joyce and Donald Evans appeared for the petitioners; W. S. Horton, E. C. Craig, E. E. Horton and R. V. Fletcher appeared for the defendant.

The petition seeks an injunction requiring the defendant to cease and desist from violating the terms of an order of the Interstate Commerce Commission entered in a cause pending before it entitled "The Minneapolis & St. Louis Railroad Company vs. Peoria & Pekin Union Railway Company" under Docket No. 13,110. A restraining order and order to show cause, returnable August 12, 1924, was issued August 8, 1924. On the return day the defendant appeared specially and moved to set aside the service of summons on the ground that this Court had no jurisdiction of the defendant, it not being a citizen or resident of Iowa, and there being no order of the Inter-

state Commerce Commission in effect, as claimed by the petitioners. On August 12, 1924, the Court ordered that a temporary injunction issue, without determining the question of jurisdiction, which [fol. 101] question was expressly reserved. The defendant also filed a motion to dismiss on the ground that the petition fails to state a cause of action against it, which motion was filed without waiving the question of jurisdiction of the Court. On September 17, 1924, the defendant filed a motion to dissolve the injunction without waiving its special appearance or objection to jurisdiction. On the twenty-fourth day of September, 1924, the Court entered an order continuing the injunction in effect and setting the defendant's motion to set aside the service of process, to dismiss the petition and to dissolve the injunction, to November 18, 1924. On November 24, 1924, the Court again continued in effect the injunction without determining the question of the jurisdiction of the Court, and, on February 12, 1925, entered an order requiring the filing of an additional bond by the plaintiffs as a condition to the continuing in effect of the preliminary injunction. The parties have stipulated that if the Court shall overrule the motions of the defendant, then the case shall be considered as submitted to the Court for final determination upon the issues raised by the pleadings which are now on file.

After hearing the arguments of counsel, and being fully advised:

It is ordered: That the service of process herein be quashed and set aside, the petition dismissed and the temporary injunction heretofore granted dissolved, with costs to the petitioners, on the ground that this Court is without jurisdiction.

The effect of this order is stayed until September 1, 1925.

(Sgd.) John B. Sanborn, United States District Judge.

Dated August 19, 1925.

[fol. 102] IN UNITED STATES DISTRICT COURT

MEMORANDUM OPINION

A statement in detail of all the facts leading up to this controversy would serve no useful purpose. Only one question is involved: Is there an order of the Interstate Commerce Commission in existence which this Court can enforce?

The defendant filed a tariff with the Interstate Commerce Commission designated as I. C. C. Tariff No. 36, effective on or about August 26, 1921, imposing a charge of Four Dollars per car upon all traffic moved by the defendant for The Minneapolis & St. Louis Railroad Company between its tracks and those of other connecting carriers at Peoria, Illinois. The Minneapolis & St. Louis Railroad Company filed with the Interstate Commerce Commission a formal complaint claiming that this tariff was illegal, unjust and discriminatory. The discrimination claimed was based on the fact that no similar charge was imposed upon the Chicago, Rock Island

& Pacific Railroad Company and the Chicago, Burlington & Quincy Railroad Company, roads for which simliar service were rendered by the defendant without charge. This complaint was designated as No. 13,110 by the Interstate Commerce Commission. A hearing was had upon it, testimony was presented, and on April 13, 1922, the Commission filed its report and order finding that the charges were unjustly discriminatory and unduly prejudicial against The Minneapolis & St. Louis Railroad Company and entered an order requiring the defendant to cease and desist, on or before July 13, 1922, and thereafter to abstain from practicing the unjust discrimination found to exist for intermediate switching between complainant and the other railroads. It is this order which the petitioners claim is still in existence and on which they base their cause of action.

After the entry of this order the defendant, in an attempted [fol. 103] compliance with it, filed a tariff imposing a somewhat smaller interchange charge upon the Chicago, Rock Island & Pacific Railroad Company and the Chicago, Burlington & Quincy Railroad Company, which is known as I. C. C. Tariff No. 40. This new tariff was protested by the railroads affected by it. The tariff was suspended and this proceeding was designated "Investigation and Suspension Docket No. 1596." The Minneapolis & St. Louis Railroad Company had in the meantime petitioned the Commission for the reopening of its proceeding No. 13,110. On July 10, 1922, an order was entered reopening No. 13,110 for further hearing and consideration in connection with No. 1596. After a hearing, the Commission, on December 22, 1922, published its report in these cases and ordered that I. C. C. Tariff No. 40 be canceled and that the complaint in Docket No. 13,110 be dismissed. On or about January 2, 1923, The Minneapolis & St. Louis Railroad Company notified defendant it would no longer pay the Four Dollars per car under Tariff No. 36, as it had theretofore done, but would expect it to perform the interchange service without charge. The defendant notified The Minneapolis & St. Louis Railroad Company that it would refuse to move cars unless such charge was paid. The Interstate Commerce Commission, on complaint of The Minneapolis & St. Louis Railroad Company, on January 18, 1923 issued Service Order No. 37, requiring the defendant to continue to interchange traffic for The Minneapolis & St. Louis Railroad Company. The defendant brought an action in the United States District Court for the Southern District of Illinois to set aside this order. This the Court refused to do. The defendant appealed. The Supreme Court of the United States held that the Interstate Commerce Commission had no power to make such an order, and on the coming down of a mandate from that Court, an order was entered setting Service Order No. 37 aside.

[fol. 103a] At a session of the Interstate Commerce Commission, held January 8, 1923, in a matter entitled "No. 14534, rates, regulations and practices of Peoria & Pekin Union Railway Company and connections at Peoria, Ill., and Nearby Points, Investigation and Suspension Docket No. 1596, Intermediate Switching Charges at

Peoria, Ill.; No. 13110, Minneapolis & St. Louis Railroad Company v. Peoria & Pekin Union Railway Company, Investigation and Suspension Docket No. 1455, intermediate switching charges at Peoria and Pekin, Ill.." it was ordered that the Commission enter upon an investigation into and concerning the lawfulness of the rates, charges, regulations and practices of the Peoria & Pekin Union Railway Company and its connections at Peoria, with a view to determining just and reasonable individual and joint rates, charges, regulations, divisions and practices, and requiring establishment thereof by order.

A part of this order is as follows:

"It is further ordered, that Docket No. 13110 and Investigation and Suspension Dockets No. 1596 and No. 1455, be, and they are hereby, reopened, consolidated with and made a part of this investigation."

On October 14, 1924, the Commission filed its report of investigation in which it found, among other things, that the charges made for interchange service for The Minneapolis & St. Louis Railroad Company were unjustly discriminatory and unduly prejudicial against it. The Commission states:

"No order will be entered at this time, but the carriers will be expected to arrange promptly for the solution of existing Peoria terminal difficulities along the lines indicated herein. The record will be held open for 60 days for this purpose. If the matter can not be rectified, it should be brought to our attention before the expiration of this period for further action in the premises."

[fol. 104] The contention of the petitioners is that the order of the Commission of April 13, 1922, requiring the defendant to cease its unjust discrimination, is now in force and effect; that the defendant has not complied with it by putting into effect non-discriminatory rates for interchange services but has been rendering interchange services to the Chicago, Rock Island & Pacific Railroad Company and the Chicago, Burlington & Quicy Railroad Company without compensation, and that the legal effect of the order is to require the defendant to do the same thing for The Minneapolis & St. Louis Railroad Company.

In its report of December 22, 1922, in Docket No. 1596, this statement of the Commission is found:

"In view of the investigation to be undertaken we shall here make no finding in No. 13110, and shall issue a formal order of dismissal in that case, without prejudice to reanvassing the situation there involved in the course of the investigation aforesaid."

The order based on the report in No. 13110 is this:

"No. 13110

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY

vs.

PEORIA & PEKIN UNION RAILWAY COMPANY

It appearing that on April 13, 1922, the Commission entered its report and order in the above case and that on July 10, 1922, this case was reopened for further hearing;

It further appearing that such further hearing and full investigation of the matters and things involved has been had, and the Commission having, on the date hereof, made and filed a report containing new findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered that the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission.

George B. McGinty, Secretary."

In the dissenting opinion of Commissioner Esch, which is a part of the report, he calls attention, in the second paragraph thereof, [fol. 105] to the fact that the decision and order of the Commission continues the unjust discrimination against The Minneapolis & St. Louis Railroad Company found to exist in the original report in No. 13,110, 68 I. C. C. 412. It is, therefore, apparent that in dismissing the complaint in this proceeding, the Commission intended to and did, in effect, vacate and set aside the order which they had made in that proceeding. The petitioners claim, however, that the order of the Commission of January 8, 1923, reopening this case, revived the order. In other words, their contention is that the order reopening the case was an order reinstating the case as it was at the time the order of dismissal was entered. It will be noted in that connection that Dockets No. 1596 and No. 1455, as well as No. 13,110, were reopened, consolidated with and made a part of the investigation to be conducted under No. 14534.

There is nothing in the order of the Commission itself which indicates any intention on its part to reinstate the former report and order in No. 13,110, which had been originally a final determination of that matter. No. 13,110 had been reopened upon application of The Minneapolis & St. Louis Railroad Company and was considered in connection with Investigation and Suspension Docket No. 1596. As a result of the hearing and investigation in connection with that matter, the order of the Commission was made dismissing that proceeding and, in effect, vacating the determination which had been made of it. I think it would hardly be contended that if the Interstate Commerce Commission had entered a formal order vacating and setting aside its first order in No. 13,110, that the order in No. 14534, reopening the case, in view of the further investigation, would have

the effect of setting aside the order vacating. The dismissal obviously had the same effect as such an order. It left the proceding as though no order had ever been entered. The order reopening No. 13,110 merely revived it for the purpose of the further investigation. [fols. 106 & 107] It could not be given the effect of reinstating the original report and order of the Commission.

The statement in the report of October 14, 1924, in No. 14534, that the Commission finds no occasion to disturb the finding of unjust discrimination against The Minneapolis & St. Louis Railroad Company contained in its first report, is some indication that the Commission was then under the impression that that report was still in effect; but that, after all, is equivalent only to a statement that it makes such finding in connection with the matter which it was then investigating, which included the proceeding commenced by The Minneapolis & St. Louis Railroad Company under Docket No. 13,110.

We cannot concern ourselves in this case with what the Commission ought to have done, or what it thought it was doing, but solely with what it actually did do. It dismissed the complaint in No. 13,110 and, with it, dismissed the order entered upon the complaint. The reopening of the case merely had the effect of putting it back upon the docket for further consideration. My conclusion is, therefore, that there is now no order of the Commission to be enforced and that this Court has no jurisdiction of this case.

(Sgd.) John B. Sanborn, United States District Judge.

[fol. 108] In United States District Court

Notice of Motion for Stay—Filed September 14, 1925

To the Peoria & Pekin Union Railway Company and R. V. Fletcher and E. E. Horton, its attorneys:

Please take notice that the above named plaintiffs will present the within application for a stay pending appeal, to the Hon. John B. Sanborn, United States District Judge, at his chambers in St. Paul, Minnesota, on the 4th day of September, 1925.

Dated August 25, 1925.

M. M. Joyce, Donald Evans, Attorneys for Plaintiffs.

Service of the above notice and receipt of copy of application is hereby acknowledged this 26 day of August, 1925.

E. E. Horton.

[fol. 109] IN UNITED STATES DISTRICT COURT

MOTION FOR STAY—Filed September 14, 1925

The above-named plaintiffs, The Minneapolis & St. Louis Railroad Company and W. H. Bremner, its Receiver, in connection with the petition for an order allowing an appeal of the above entitled cause to the Supreme Court of the United States, which is presented herewith, respectfully pray that an order be entered staying the effect of the order entered herein on August 21, 1925, dissolving the temporary injunction heretofore granted, pending the appeal, to the end that they may not be subjected to irreparable injury and damage by being required to submit to the imposition of charges which, as shown by the record, the defendant is attempting to collect, or to the damages that may be sustained by them as a result of the threatened interruption of traffic and the threatened refusal on the part of the defendant to permit interchange of cars to be made between these plaintiffs and the tenants of the defendant, and to the end that they may not be deprived of the fruits of a successful appeal; [fol. 110] upon such terms as to the court may seem equitable and just.

Dated this 25th day of August, 1925.

The Minneapolis & St. Louis Railroad Company and W. H. Bremner, Its Receiver, Plaintiffs, by M. M. Joyce, Donald Evans, Attorneys.

[fol. 111] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed September 14, 1925

To the Honorable District Court of the Southern District of Iowa:

The Minneapolis & St. Louis Railroad Company and W. H. Bremner its Receiver, the above named plaintiffs feeling aggrieved by the order made and entered in the above entitled cause the 21st day of August, 1925, dismissing the petition of the plaintiffs filed herein and quashing and setting aside the service of process and dissolving the temporary injunction heretofore granted, do hereby appeal from said order to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed and that citations be issued as provided by law and that transcript of the record and proceedings and documents upon which said order was based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington in the District of Columbia, under the rules of such court in such cases made and provided.

Dated this 25th day of August, 1925.

The Minneapolis & St. Louis Railroad Company and W. H. Bremner, Its Receiver, Plaintiffs. (Sgd.) M. M. Joyce, (Sgd.) Donald Evans, Attorneys.

[fol. 112] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed September 14, 1925

Now come the above named plaintiffs, The Minneapolis & St. Louis Railroad Company and W. H. Bremner, its Receiver, by their attorneys, and present with the accompanying petition for appeal from an order entered herein on the 21st day of August, 1925, the following assignment of errors:

First. The court erred in quashing and setting aside the service of process and dissolving the temporary injunction heretofore granted in said cause and dismissing the plaintiff's petition.

Second. The court erred in holding that it was without jurisdiction.

Third. The court erred in holding that the order of the Interstate Commerce Commission dated April 13, 1922, directing the defendant to remove the discrimination found in the report of the Interstate Commerce Commission to exist, was nullified and abrogated by the entry of the order of the Interstate Commerce Commission on December 22, 1922.

Fourth. The court erred in refusing to hold that the order of January 8, 1923, had the effect of leaving Interstate Commerce Commission Docket No. 13,110 in the same situation as if the order to dismiss the complaint had never been entered.

The Minneapolis & St. Louis Railroad Company and W. H. Bremner, Its Receiver, Plaintiffs. (Sgd.) M. M. Joyce, (Sgd.) Donald Evans, Attorneys.

[fol. 113] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed September 14, 1925

The above named plaintiffs, The Minneapolis & St. Louis Railroad Company and W. H. Bremner, its Receiver, having duly filed their petition for appeal and an assignment of errors, it is

Ordered by the court that an appeal to the Supreme Court of the United States from the order heretofore filed and entered herein be, and the same is hereby allowed, and that a certified transcript of the record, affidavits, documents and all proceedings herein be forthwith submitted to said Supreme Court.

It is further ordered, that inasmuch as it is made to appear to the court that the District Court of the United States for the District of Minnesota has entered an order in the cause entitled "Guaranty Trust Company of New York, as Trustee, et al. vs. The Minneapolis & St. Louis Railroad Company, et al." therein pending, in which cause W. H. Bremner was appointed as Receiver of The Minneapolis & St. Louis Railroad Company, directing said Receiver to create a

[fol. 114] reserve fund of Four Dollars ($4.00) per car for each car delivered to the Peoria & Pekin Union Railway Company in interchange to its tenants, said reserve fund to be carried on the books of said Receiver as a reserve for the special purpose of satisfying any liability that may be finally determined by the Interstate Commerce Commission or a court of competent jurisdiction to accrue in favor of the Peoria & Pekin Union Railway Company pending said appeal, which said order is found to be proper security of the rights of the defendant company, the effect of the order heretofore entered dissolving the temporary injunction granted in said cause be stayed pending the appeal of the plaintiffs to the Supreme Court of the United States, or the further order of this court.

By the Court:

(Sgd.) John B. Sanborn, District Judge.

Dated September 12th, 1925.

[fols. 115 & 116] Bond on appeal for $1,000, approved and filed September 29, 1925, omitted in printing.

[fol. 117] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed September 25, 1925

To the Clerk of the above-entitled court:

You will please prepare Transcript of the Record in this cause to be filed in the office of the Clerk of the Supreme Court of the United States, under the appeal heretofore allowed by the District Court of the United States, for the Southern District of Iowa, Central Division, from the Order of August 21st, 1925, and included in said Transcript the following pleadings, proceeding and papers on file:

1. The Petition of The Minneapolis & St. Louis Railroad Company and W. H. Bremner, Receiver, and Exhibits thereto attached.
2. Supplemental Petition.
3. Temporary Restraining Order.
4. Subpœna in Chancery, with Marshal's return.
5. Special Entry of Appearance.
6. Order for Temporary Injunction.
7. Bond.
8. Motion to Dissolve Injunction.
9. Order entered September 24, 1924.
10. Answer.
11. Agreement.
12. Order entered November 24, 1924.

[fols. 118-644] 13. Motion for Additional Bonds.

14. Order entered February 12, 1925.
15. Stipulation of July 28, 1925.
16. Memorandum and Order entered August 21, 1925.
17. Order entered August 24, 1925.
18. Notice of Application for Stay pending Appeal.
19. Application for Stay.
20. Petition for Appeal and Assignment of Errors.
21. Order allowing Appeal.
22. Citation.
23. Bond.
24. Plaintiffs' Exhibits "A", "B", consisting of three parts, "C" "D", "E", "F", "G", "H", "I" and "J".
25. Præcipe.

M. M. Joyce, Donald Evans, Solicitors for Plaintiffs

[fols. 645-655] In United States District Court

Plaintiffs' Exhibit "B"

Interstate Commerce Commission, Washington

I, George B McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of report and order of the Commission filed and entered December 22, 1922, in Investigation and Suspension Docket No. 1596, Intermediate Switching Charges at Peoria, Ill., and docket No. 13110, Minneapolis & St. Louis Railroad Company v. Peoria & Pekin Union Railway Company, the original of which is now on file and of record in the office of this Commission. I further certify that copy of said report and order was served upon R. S. Knapp, designated agent of the Peoria & Pekin Union Railway Company on December 29, 1922, receipt for which is now on file and of record in the office of this Commission.

In witness whereof, I have hereunto set my hand and affixed the Seal of said Commission this 7th day of August, A. D. 1924.

(Sgd.) George B. McGinty, Secretary of the Interstate Commerce Commission. (Seal of Interstate Commerce Commission affixed hereto.)

Report of the I. C. C. on the investigation of Intermediate Switching Charges at Peoria, Ill.; omitted. See Exhibit B, printed side page 20 ante.

[fols. 656-666] Interstate Commerce Commission, Washington

I, George B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is true copy of report and order of the Commission filed and entered April 13, 1922, in docket

No. 13110, Minneapolis & St Louis Railroad Company v. Peoria & Pekin Union Railway Company, and Investigation and Suspension Docket No. 1455, Intermediate Switching Charges at Peoria and Pekin, Ill., the original of which is now on file and of record in the office of this Commission. I further certify that copy of said report and order was served upon R. S. Knapp, designated agent of the Peoria & Pekin Union Railway Company on April 13, 1922, receipt for which is now on file and of record in the office of this Commission.

In witness whereof, I have hereunto set my hand and affixed the Seal of said Commission this 7th day of August, A. D., 1924.

(Sgd.) George B. McGinty, Secretary of the Interstate Commerce Commission. (Seal of Interstate Commerce Commission hereto affixed.)

Report of Interstate Commerce Commission in the case of Minneapolis & St. Louis R. R. Co. vs. Peoria & Pekin Union Ry. Co.; omitted. See Exhibit "A," printed side page 10 ante.

[fol. 667] EXHIBIT "B"

ORDER FOR INVESTIGATION OF RATES, ETC., OF PEORIA & PEKIN UNION RY. CO. AND ORDER MAKING PARTIES RESPONDENT

AT A GENERAL SESSION OF THE INTERSTATE COMMERCE COMMISSION HELD AT ITS OFFICE, IN WASHINGTON, D. C., ON THE 8TH DAY OF JANUARY, A. D., 1923

No 14534

Rates, Regulations and Practices of PEORIA & PEKIN UNION RAILWAY COMPANY and Connections at Peoria, Ill., and Nearby Points

Investigation and Suspension Docket, No. 1596

Intermediate Switching Charges at Peoria, Ill.

No. 13110

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY

v.

PEORIA & PEKIN UNION RAILWAY COMPANY

Investigation and Suspension Docket, No. 1455

Intermediate Switching Charges at Peoria and Pekin, Ill.

The Commission having under consideration the question of the lawfulness of the rates, regulations and practices of the Peoria &

Pekin Union Railway Company and railroads with which it connects at and in the vicinity of Peoria, Ill.:

It is ordered, That the Commission upon its own motion enter upon an investigation into and concerning the lawfulness of the rates, charges, regulations and practices of the Peoria & Pekin Union Railway, and railroads with which it connects at and in the vicinity of Peoria, Ill., as applied to traffic to, from and via Peoria, Ill.; including the lawfulness of existing contracts between the Peoria & Pekin Union Railway and the so-called tenants of that railroad, also the lawfulness of existing joint rates via Peoria, and the divisions thereof, on traffic moving in connection with the Peoria & Pekin Union Railway, and the nature and extent of the facilities furnished and services rendered by any of the respondents to other of the respondents at or near Peoria, whether in make-up or break-up yards, spotting, intermediate or terminal service, or otherwise, including facilities furnished or services rendered in respect of traffic moving on combination rates which break at Peoria, and the compensation therefor as between the respondents; with a view to determining just and reasonable individual and joint rates, charges, regulations, divisions and practices and requiring establishment thereof by order.

It is further ordered, That the Peoria & Pekin Union Railway Company, Peoria Railway Terminal Company and W. G. Bierd and H. I. Battles, Receivers, The Minneapolis & St. Louis Railroad Company, Chicago, Burlington & Quincy Railroad Company, The Chicago, Rock Island & Pacific Railway Company, The Chicago & Alton Railroad Company and William W. Wheelock and William G. Bierd, Receivers, Toledo, Peoria & Western Railway Company and S. M. Russell, Receiver, Illinois Central Railroad Company, The Atchison, Topeka & Santa Fe Railway Company, The Lake Erie & Western Railroad Company, The Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Chicago, Peoria & St. Louis Rail-
[fol. 668] road Company and Bluford Wilson and William Cotter, Receivers, Chicago & North Western Railway Company, The Pittsburgh, Cincinnati, Chicago & St. Louis Railroad Company, and St. Louis, Springfield & Peoria Railroad be, and they are hereby, made respondents to this proceeding; and that a copy of this order be served upon each of such respondents.

It is further ordered, That Docket No. 13110 and Investigation and Suspension Dockets No. 1596 and No. 1455, be, and they are hereby, reopened, consolidated with and made a part of this investigation.

And it is further ordered, That the consolidated proceeding be, and it is hereby, assigned for hearing at the Great Northern Hotel, Chicago, Ill., on February 20, 1923, at ten o'clock before Examiner Gault.

By the Commission.

George B. McGinty, Secretary. (Seal.)

A true copy. George B. McGinty, Secretary. (Seal Interstate Commerce Commission, 1887.)

[fol. 669] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT "C"

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS, NORTHERN DIVISION

In Equity. No. 205

PEORIA & PEKIN UNION RAILWAY COMPANY, Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant, and INTERSTATE COMMERCE COMMISSION, Intervening Defendant

Answer of Interstate Commerce Commission

The Interstate Commerce Commission, intervening defendant in the above-entitled suit, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the plaintiff's bill of complaint contained, for answer thereunto, or unto so much or such parts thereof as it is advised that it is material for it to answer, answers and says:

I

Answering paragraph 1 of the bill of complaint, the intervening defendant, Interstate Commerce Commission, hereinafter called the Commission, admits, for the purposes of this suit, that the allegations contained in said paragraph are true, except that it denies that said Service Order No. 37 was not made upon the petition of any party or parties in interest. In this connection the Commission alleges that said service order was made as a result of the Commission's investigation pursuant to a petition filed in its office by the Minneapolis & St. Louis Railroad Company.

[fol. 670] II

Answering paragraph 2 of the bill of complaint, the Commission admits that plaintiff is a railroad corporation incorporated under the general railroad act of Illinois on September 25, 1880, but disclaims information sufficient to form a belief as to whether the other allegations contained in said paragraph are, or as to whether any of said allegations is, true.

III

Answering paragraphs 3 to 9, inclusive, of the bill of complaint, the Commission alleges that the allegations contained in said paragraphs, except as hereinafter set forth, relate to matters which are incompetent, irrelevant and immaterial as applied to the issues in this suit. Therefore, the Commission neither admits nor denies

said allegations, but leaves plaintiff to establish the truth of the same by competent proof if believed to be material and if plaintiff is permitted to do so by the court. In this connection the Commission alleges that plaintiff cannot, by entering into contracts with other common carriers, prevent the Commission from making and issuing orders such as its Service Order No. 37 under the authority conferred upon it by the Interstate Commerce Act and for the purpose of performing duties imposed upon the Commission by that Act. The Commission admits and alleges that the rails of the Minneapolis & St. Louis Railroad Company do not connect directly with the rails of the railroads, other than the plaintiff, mentioned in paragraph 5, and that through traffic moving from or to the rails of the Minneapolis & St. Louis Railroad Company at or near Peoria to or from the rails of said other railroads must be transported over the rails owned or used by the plaintiff. The Commission fur- [fol. 671] ther admits that it granted to plaintiff a special permission No. 54479 to file upon one day's notice plaintiff's tariff I. C. C. No. 36. For full and complete information as to the terms of this tariff the Commission refers the court to a true copy thereof which is attached hereto as Exhibit A and made a part hereof. The Commission further admits that on April 13, 1922, it made its report and order in the proceeding, docket No. 13110, mentioned, and refers the court to said report and order, copies of which are attached as Exhibit 3 to the bill of complaint. The Commission admits that the plaintiff filed its tariff I. C. C. No. 40, and refers the court to a copy thereof, which is attached hereto as Exhibit B and made a part hereof. The Commission admits that it entered its opinion and order on December 22, 1922, in the second proceeding mentioned, and refers the court to a copy thereof, which is marked Exhibit 4 and attached to the bill of complaint.

IV

Answering paragraph 10 of the bill of complaint, the Commission disclaims information sufficient to form a belief as to whether the allegations of fact contained in said paragraph are, or as to whether any of said allegations is, true, except that the Commission denies that said Service Order No. 37 requires plaintiff to perform without compensation the services, or any of the services, referred to.

V

Answering paragraph 11 of the bill of complaint, the Commission admits that in the early days of January, 1923, the unwillingness or refusal of the plaintiff to longer continue to perform interchange service at and in the vicinity of Peoria between the Minneapolis & St. Louis Railroad Company and other carriers serving Peoria was brought to the attention of the Commission; that on January 5, 1923, [fol. 672] Commissioner Aitchison, a member of the Commission, sent a telegram to the President of the plaintiff, a true copy of which is hereto attached as Exhibit C and made a part hereof as if herein

set forth at length; that said telegram was sent in response to a telegram from said President to the Secretary of the Commission, dated January 4, 1923, a true copy of which is hereto attached as Exhibit D and made a part hereof, as if herein set forth at length. As to the other allegations of said paragraph 11 of the bill of complaint the Commission disclaims information sufficient to form a belief as to the truth thereof.

VI

Answering paragraph 12 of the bill of complaint, the Commission, on information and belief, admits that after said telegram was sent by Commissioner Aitchison, informal conferences were had by counsel for the plaintiff, among others, with members of the Commission, and that subsequently and on, to wit, January 16, 1923, notice was given by plaintiff to the Commission and to the Minneapolis & St. Louis Railroad Company that unless payments claimed by the plaintiff from the Minneapolis & St. Louis Railroad Company were made promptly, the plaintiff would discontinue to interchange freight traffic between the Minneapolis & St. Louis Railroad Company and other carriers at and in the vicinity of Peoria, on and after 12 M. January 20, 1923. As to the truth of the other allegations in said paragraph 12, the Commission disclaims information sufficient to form a belief.

VII

Answering paragraph 13 of the bill of complaint, the Commission admits and alleges that a petition was filed with it by the Minneapolis & St. Louis Railroad Company on, to wit, January 6, 1923, and that thereafter on, to wit, January 8, 1923, an informal conference was [fol. 673] held by Division 5 of the Commission, at which counsel for the plaintiff and counsel for said Minneapolis & St. Louis Railroad Company were present, and that at this time the matter of the controversy between the plaintiff and the Minneapolis & St. Louis Railroad Company was gone into thoroughly and an effort was made by the Commission to bring about an amicable settlement without interrupting the flow of traffic into and through Peoria and the vicinity thereof. The Commission at this conference pointed out that it had already entered its order in docket No. 14534, a copy of which order is attached to the bill of complaint as Exhibit 5, with a view to effecting a reasonable adjustment of rates, divisions and charges as between the carriers in and in the vicinity of Peoria. The Commission further alleges that its Service Order No. 37 was made and served upon plaintiff in accordance with the authority conferred and duties imposed upon the Commission by paragraph (15) of section 1 of the Interstate Commerce Act, which is an emergency paragraph and authorizes the making and service of such orders without the holding of formal hearings.

VIII

Answering paragraph 14 of the bill of complaint, the Commission admits that it made and entered its service order No. 37, and admits

that the tariff referred to is in effect and on file in the Commission's office, but the Commission denies each of and all the other allegations contained in said paragraph, and in particular denies that by said order plaintiff is required to handle traffic without compensation.

IX

Answering paragraph 15 of the bill of complaint, the Commission calls attention to the fact that this paragraph contains only con- [fol. 674] clusions of law, and therefore the Commission neither admits nor denies any of the allegations therein contained.

X

Answering paragraph 16 of the bill of complaint, the Commission says that the allegations therein contained purport to state provisions of the statutes of the United States and the Commission, therefore, neither admits nor denies the same.

XI

Answering paragraph 17 of the bill of complaint, the Commission denies that, as alleged in said paragraphs, it issued a pretended service order, but admits that it made an order in the proceeding mentioned, and refers the court to said order, copy of which is attached as Exhibit 5 to the bill of complaint.

XII

Answering paragraph 18 of the bill of complaint, the Commission denies each of and all the allegations therein contained.

XIII

Answering paragraph 19 of the bill of complaint, the Commission denies that said Service Order No. 37 is illegal. On the contrary the Commission alleges that said order was made and served upon plaintiff in accordance with the authority conferred upon the Commission by th Interstate Commerce Act, including paragraph (15) of section 1 of said Act, and for the purpose of performing a duty imposed upon the Commission by that act.

Except as herein expressly admitted, the Commission denies the truth of each of and all the material allegations of fact contained in [fol. 675] the bill of complaint, in so far as they are inconsistent or in conflict with the denials and the allegations contained in this answer.

All of which matters and things the Commission is ready to aver, maintain and prove as this honorable court shall direct and hereby prays that said bill of complaint may be dismissed.

Interstate Commerce Commission, by R. G. Curry, E. M. Reidy. P. J. Farrell, of counsel.

Duly sworn to by Clyde B. Aitchison. Jurat omitted in printing.

[fol. 676] EXHIBIT "A" TO PLAINTIFF'S EXHIBIT "C"

Tariff I. C. C. No. 36

Peoria and Pekin Union Railway Company switching tariff, Naming intermediate switching rates on all freight cars coming from or destined to points beyond the Peoria-Pekin switching district regardless of origin or destination, except empties, on which this company receives a loaded haul one way. Intermediate service only.

Apply following rates in dollars and cents per car:

Between	And	Rate per car
Track connection with Minneapolis & St. Louis Railroad	Peoria and Pekin Union Railway Company tracks in East Peoria Yards.	$4.00 (See Note.)

NOTE.—Will not apply to switching service for tenant companies under tenancy contracts.

Issued upon one day's notice as per Interstate Commerce Commission Special Permission No. 54479, dated August 26, 1921, and I. C. C. Tariff Circular 18A, Rule 58.

Effective August 30, 1921.

Issued by

E. F. Stock, General Freight and Passenger Agent.

Issued August 27, 1921.

[fol. 677] EXHIBIT B TO PLAINTIFF'S EXHIBIT "6"

I. C. C. No. 20. I. C. C. No. 40

No supplement to this tariff will be issued except for the purpose of canceling the tariff.

Peoria and Pekin Union Railway Company in interchange switching tariff, Naming intermediate switching rates on all freight cars from and to points beyond the Peoria-Pekin Switching District (*) regardless of origin or destination, except empties on which this company receives a loaded haul one way. Intermediate service only.

Apply following rates in dollars and cents per car:

Between	And	Rate per car (A)
Track connection with Chicago, Burlington & Quincy Railroad Company	Peoria and Pekin Union Railway Company track connections, with connecting lines in East Peoria Yards.	$3.00 (See note.)

Between	And	Rate per car (A)
Track connection with the Chicago, Rock Island and Pacific Railway Company	Peoria and Pekin Union Railway Company track connections, with connecting lines in East Peoria Yards.	$3.50
Track connection with Peoria Railway Terminal Company at Iowa Junction	Peoria and Pekin Union Railway Company track connections, with connecting lines in East Peoria Yards.	$4.00
	Peoria and Pekin Union Railway Company track connection with Chicago and Northwestern Railway Company in Adams St. Yards.	$2.50
Track connection with Illinois Traction System	Peoria and Pekin Union Railway Company track connections, with connecting lines in East Peoria Yards	$4.00

NOTE.—Will not apply to switching service rendered tenant companies under tenancy contracts.

The Tenant Companies are: The Chicago and Alton Railroad Company, Chicago, Peoria and St. Louis Railroad Co. (Bluford Wilson and William Cotter, Receivers), The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, Illinois Central Railroad Company, The Pittsburgh, Cincinnati, Chicago and St. Louis Railroad Company, Chicago and Northwestern Railway Co., The Lake Erie and Western Railroad Co., Toledo, Peoria and Western Railway Co. (Samuel M. Russell, Receiver).

(*) For description Peoria-Pekin Switching District see Agent E. B. Boyd's Tariff 152-C. I. C. C. No. A-1260, Ill. C. C. No. 115, (Item 65), supplements thereto or reissues thereof.

(A) Advance.

Issued in compliance with Interstate Commerce Commission Order April 13, 1922, in Case 13110.

Effective July 1, 1922.

Issued by

E. F. Stock, G. F. & P. A. Peoria, Illinois.

Issued May 27, 1922.

[fol. 678] EXHIBIT C TO PLAINTIFF'S EXHIBIT "C"

For Government business only. Telegraph blank.

Interstate Commerce Commission, Washington

January 5, 1923.

V. V. Boatner, Peoria and Pekin Union Railway, Peoria, Illinois:

Telegram to Secretary McGinty today. Order against Peoria and Pekin Union Railway still stands unrescinded with finding that its tariff on traffic interchanged with Minneapolis and St. Louis Railway is unduly prejudicial so long as Burlington and Rock Island are preferentially treated. Period. Commission is firmly of opinion that traffic through Peoria gateway must be kept moving in the public interest and desires assurances from you that there will be no interruption pending orderly disposition of any questions disputed between your company and common carriers connecting with you. Please answer.

Clyde B. Aitchison, Chairman Division 5.

Charge Government Rates; payable at office of Commission at Washington.

[fol. 679] EXHIBIT D TO PLAINTIFF'S EXHIBIT "C"

Western Union Telegram

Newcomb Carlton, President. George W. E. Atkins, First Vice-President

Received at Commercial Nat'l Bank Bldg., 14th & G Sts., N. W., Washington, D. C.

1923, Jan. 4, p. m. 6.50

AA418 CAK. UD., Peoria, Ill., 4 436 P.

G. B. MCGINTY, Secretary Interstate Commerce Commission, Washington, D. C.:

Commission decision I and S. Docket Fifteen Ninety Six original report thirteen one ten stop Minneapolis and St. Louis Railroad Company advises in view of such decision it refuses to make further payments to Peoria and Pekin Union Railway Company of charges named in tariff Eye See See number Thirty Six or any other tariff carrying charges on traffic interchanged at Peoria with tenant lines of Peoria and Pekin Union Railway Company stop. This Company construes decision of Commission to dismiss complaint of Minneapolis and St. Louis Railroad Company leaving tariff Eye See See number thirty six in full force and effect and

stands ready and willing to accept all traffic offered in interchange on basis such tariff and has notified Minneapolis and St. Louis Railroad Company that unless settlements for handling of the traffic interchanged are made upon same basis heretofore existing it would be necessary to place that company upon cash basis requiring payment of tariff charges when cars are offered in interchange stop This for information of Commission concerning situation at Peoria stop.

V. V. Boatner, P. and P. U. Ry.

[fol. 680] UNITED STATES OF AMERICA,
Southern District of Illinois,
Northern Division, ss:

I, S. T. Burnett, Clerk of the District Court of the United States for the Southern District of Illinois and keeper of the records and seals thereof, do hereby certify the foregoing to be a true copy of the answer and exhibits attached thereto filed by the Interstate Commerce Commission in this court in the cause entitled Peoria & Pekin Union Railway Company, Plaintiff vs. The United States of America, Defendant, and Interstate Commerce Commission, Intervening Defendant, Equity #205, as fully as the same appears from the records now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Peoria, in said District, this 8th day of August, A. D. 1924.

(Sgd.) S. T. Burnett, Clerk. (Seal of U. S. District Court, Southern District of Illinois, Northern Division, hereto affixed.)

[fol 681] IN UNITED STATES DISTRICT COURT

9880

INTERSTATE COMMERCE COMMISSION

PLAINTIFF'S EXHIBIT "D"

No. 14534[1]

RATES, REGULATIONS, AND PRACTICES OF PEORIA & PEKIN UNION RAILWAY COMPANY AT PEORIA, ILL., AND NEAR-BY POINTS

Submitted June 23, 1923. Decided October 14, 1924

1. The Peoria & Pekin Union found to be an independent common carrier entitled to assess charges for transportation services performed.

[1] This report embraces also Investigation and Suspension Docket No. 1596, Intermediate Switching Charges at Peoria, Ill.; No. 13110, Minneapolis & St. Louis Railroad Company v. Peoria & Pekin Union Railway Company; and Investigation and Suspension Docket No. 1455, Intermediate Switching Charges at Peoria and Pekin, Ill.

2. Switching charges, rates, and practices of the Peoria & Pekin Union at and in the vicinity of Peoria, Ill., found unjustly discriminatory and unduly prejudicial to the extent indicated in the report. General principles indicated for removing the unjust discrimination and undue prejudice found to exist.

3. Conference Ruling No. 341 overruled.

4. Former reports in No. 13110 and the investigation and suspension cases, 68 I. C. C., 412, and 77 I. C. C., 43.

M. M. Joyce and Donald Evans for Minneapolis & St. Louis Railroad Company; Kenneth F. Burgess and Walter McFarland for Chicago, Burlington & Quincy Railroad Company; A. B. Enoch for Chicago, Rock Island & Pacific Railway Company; Silas H. Strawn and Frank H. Towner for Chicago & Alton Railroad Company, W. W. Wheelock and W. G. Bierd, receivers, and Peoria Railway Terminal Company, W. G. Bierd and H. I. Battles, receivers; Robert H. Widdicombe for Chicago & North Western Railway Company; R. G. Nicholson for Atchison, Topeka & Santa Fe Railway Company; R. V. Fletcher for Illinois Central Railroad Company; R. V. Fletcher, J. M. Elliott, F. J. Quinn, and E. E. Horton for Peoria & Pekin Union Railway; Thomas W. White, D. P. Connell, and L. P. Day for Cleveland, Cincinnati, Chicago & St. Louis Railway Company and Pennsylvania Railroad Company; W. J. Stevenson for Lake Erie & Western Railroad Company; O. P. Westervelt for Toledo, Peoria & Western Railway and S. M. Russell, receiver; and James A. Knowlton for St. Louis, Springfield & Peoria Railroad Company.

O. B. Eddy for Peoria Association of Commerce; W. T. Cornelison for Peoria Board of Trade, Burlington Elevator Company, and [fol. 682] Mueller Grain Company; James A. Fenelon for Eighth District Coal Operators Association, Central West Coal Company, Crescent Coal Company, and Silver Creek Colliery Company.

Clarence B. Cardy for Clark Coal & Coke Company.

Report of the Commission

By the Commission:

Certain phases of this matter which have to do chiefly with charges of the Peoria & Pekin Union, hereinafter referred to as the Union, for intermediate switching at and in the vicinity of Peoria, Ill., were considered in our former reports in No. 13110 and the related investigation and suspension cases, Minneapolis & St. Louis R. R. Co. v. P. & P. U. Ry. Co., 68 I. C. C., 412, and Switching Charges at Peoria, 77 I. C. C., 43, wherein the terminal situation is explained in considerable detail. For convenience certain descriptive facts will be restated. All of the points referred to are in Illinois. Peoria is in Peoria County, on the west bank of the Illinois River. Directly across the river to the east in Tazewell County

is what is known as East Peoria. Pekin is about 9 miles south of Peoria on the east bank of the river. The Peoria-Pekin switching district includes Peoria, East Peoria, and Pekin. East Peoria is within the Peoria switching district, but not within the municipal limits of Peoria.

As indicated by the opposite sketch, the Chicago, Rock Island & Pacific, hereinafter referred to as the Rock Island, enters Peoria from the northeast and the Chicago, Burlington & Quincy, the Chicago & North Western, and the Minneapolis & St. Louis, hereinafter referred to as the Burlington, the North Western, and the M. & St. L., respectively, enter from the northwest by lines practically parallel. The rails of the Rock Island, the Burlington, and the M. & St. L. terminate in Peoria. The North Western has a line extending to the south on the west side of the river. The rails of the Cleveland, Cincinnati, Chicago & St. Louis, the Chicago, Peoria & St. Louis, hereinafter referred to as the Big Four, and the C. P. & St. L., respectively, and the Illinois Central terminate in Pekin. The southern division of the Chicago & Alton, hereinafter referred to as the Alton, extends through Pekin to a junction with the Union in the vicinity of Grove. The Lake Erie & Western, referred to hereinafter as the Lake Erie, the Toledo, Peoria & Western, also known as the T. P. & W., the northern division of the Alton, and the Pennsylvania approach the Peoria district from the east, the latter two over the rails of the T. P. & W. None of these so-called eastside lines has rails into Peoria proper, although they hold themselves out to the public as serving Peoria. Entry into that city is effected by means of the facilities of the Union, which has a double-track line on the east side of the river between Pekin and East Peoria, with a bridge crossing at the latter point, and a single-track line on the west side of the river from Peoria to a point across the river from Pekin. The Union has also extensive yards and industrial trackage besides freight houses, team tracks, and other terminal facilities among which are the so-called P. & S. yard near the union station in Peoria, yards 90 and 91 some distance to the southwest, and the Wesley yard and East Peoria yard in East Peoria. The Peoria Railway Terminal, referred to as the Terminal, the stock of which is owned jointly by the Rock Island and the Alton, has a line extending southward from Peoria on the west side of the river to Pekin, in addition to certain terminal and industrial facilities.

(Here follows map, marked side folio page 683)

[fol. 684] The Union is conceded to be a common carrier and we have recognized it as such in St. Louis, Springfield & Peoria R. R. v. P. & P. U. Ry. Co., 26 I. C. C. 226. It was organized under the general railroad act of Illinois in the fall of 1880. Thereafter it acquired by purchase or lease the tracks and other properties which became the nucleus of its present facilities. In February,

PEORIA LAKE
EAST PEORIA YARD
KEYSTONE STEEL CO.
PEORIA RIVER
LIMESTONE TWP
PEORIA TWP
GROVELAND TWP
LEVEE

1881, it entered into contracts with the predecessors in interest of the Big Four, the T. P. & W., the C. P. & St. L., and the Illinois Central, which obligated the Union to perform certain terminal services for those lines and granted them certain rights in the properties and facilities of the Union. Contracts of similar tenor were afterwards executed with other steam railroads in the Peoria district, including the M. & St. L., but not with the Burlington or the Rock Island; and the North Western and the Lake Erie became stockholders. The Pennsylvania and the Alton have contractual arrangements with the Union but own no part of the latter's capital stock. The carriers serving Peoria under these contracts are commonly known as tenant lines. Some of the contracts have expired and have not been formally renewed, the tenants holding over under the provisions thereof. The contract with the M. & St. L. expired on March 31, 1921, and that company, instead of continuing its relationship with the Union, made arrangements with the Rock Island for such additional facilities as it deemed necessary.

The contracts provide that the tenant lines of the Union shall pay reasonable charges for transferring freight cars to and from connecting railroads at a uniform rate per car previously fixed by the Union, to be charged to all companies for such service without [fol. 685] discrimination, to approximate the actual cost of service as nearly as practicable, and to include charges for making up trains. These charges are commonly referred to as in-and-out charges and have varied in amount from time to time. Effective October 3, 1922, they became $2.40 on through cars and $2.70 on local cars. For some years they were carried in tariffs filed with us. On January 1, 1923, it is stated, the charges were reduced to $2 on through cars and $2.50 on local cars, and on February 18, 1923, the tariff publishing the rates was canceled by a supplement containing the explanation "For rates refer to individual contracts with tenant companies of the Peoria & Pekin Union Railway Company." Through cars, it should be explained, are defined as cars delivered to a connection of the Union, although final delivery may be within the switching district on the rails of the connection, and local cars as cars delivered on the rails of the Union. The tenants are assessed an industrial switching charge to and from industries on the Union, but pay no charges in addition to the in-and-out charge for movements to and from the freight house, team tracks, and Union stockyards.

The withdrawal of the M. & St. L. from its arrangement with the Union precipitated the present controversy. To appreciate the effects of the action of the M. & St. L. a brief description of the Union's method of operation with regard to interchange traffic is necessary. A train coming in over the Illinois Central, for example, through Pekin passes over the main line of the Union under Illinois Central power, for which the Illinois Central is obliged to make certain payments to the Union on a wheelage basis. After the train is delivered by the Illinois Central in the East Peoria yard of the Union, the locomotive is detached and proceeds to the Union's roundhouse. The train is then broken up by the Union and the cars segre-

gated according to dispositions to be made. For each car handled the Union receives from the Illinois Central the in-and-out charge described above. Cars for the M. & St. L., during its tendancy, were assembled in cuts and taken over to the Bartlett yard of the M. & St. L. where, according to the contract, they, with other cars, were made up by the Union in train order for outbound movement. The M. & St. L. engine later was attached and the train sent out on the road. That, at least, was the operation in theory. The M. & St. L. insists that the Union did not perform its part of the contract in making up its trains and otherwise. It is unnecessary to consider that aspect of the matter. It is conceded that in so far as the contract between the M. & St. L. and the Union is concerned the former was within its rights in not renewing the contract. While the contract was in effect the Union collected from the M. & St. L. the [fol. 686] in-and-out charge on cars made up in trains for outbound movement by the M. & St. L. The result was that on a car coming in on the Illinois Central destined to a point on the M. & St. L. the Union received two in-and-out charges, one from the Illinois Central and the other from the M. & St. L. The practice was similar in the reverse direction. The effect was that the expense of transfer was divided. It is now divided in a similar manner as between tenant lines. After the withdrawal of the M. & St. L. the only revenue directly accruing to the Union from the transfer of through cars to and from the M. & St. L. was the in-and-out charge against the tenant line. Neither the Rock Island nor the Burlington, both non-tenant lines, have ever paid the Union for the interchange of through traffic to or from tenant lines.

For a time after the withdrawal of the M. & St. L. the matter was left at rest. But following a change in the management of the Union, an effort was made to obtain compensation from the M. & St. L., with the result that the Union established on short notice, effective August 30, 1921, a charge of $4 per car for switching freight cars between the rails of the M. & St. L. at Peoria and the Union's tracks in its East Peoria yard, when the cars come from or are destined to points beyond the Peoria-Pekin switching district. Later the Union filed schedules proposing charges, effective December 16, 1921, for switching freight cars between the tracks of the Terminal and the Union's tracks in the East Peoria yard and also tracks of the Union in yards other than the East Peoria yard. The schedules were suspended and the proceeding disposed of in conjunction with an attack by formal complaint on the charge established against the traffic of the M. & St. L. We found that the Union was a common carrier and performed certain uncompensated intermediate services at Peoria and East Peoria, between the M. & St. L. and the Terminal, on the one hand, and the proprietary and nonproprietary tenants of the Union, on the other hand; that reasonable tariff charges might be assessed for such uncompensated services; but that the charges then effective to and from the rails of the M. & St. L., and those proposed to and from the Terminal were unjustly discriminatory and unduly prejudicial, in that no similar charges were assessed on traffic handled in intermediate service between the

Burlington or the Rock Island and respondent's tenants. Minneapolis & St. Louis R. R. Co. v. P. & P. U. Ry. Co., supra. Thereafter the Union filed schedules to become effective July 1, 1922, proposing charges against traffic from and to the Rock Island and the Burlington but containing a note that the charges would not apply to switching service rendered tenant companies under tendency [fol. 687] contracts. These schedules were suspended, found not justified, and this general investigation ordered. Switching Charges at Peoria, supra. The situation, then, is that there is a tariff on file providing for a charge applying to or from the rails of the M. & St. L. only.

In the interchange of traffic between carriers it is the ordinarily accepted practice for the receiving line to designate tracks within a reasonable distance of the intersection of its rails with those of a connecting carrier where cars will be received from the delivering line, and the latter places the cars on the tracks so designated. There is a tendency on the part of the witnesses to distinguish between the point of interchange and the point of delivery, the former being defined as the point where the tracks of the two lines actually connect and the latter as the place where, according to mutual agreement, the cars are deposited. Before the organization of the Union the Rock Island and the Burlington interchanged traffic on the west side of the river with the railroads operating the trackage there which later became a part of the Union facilities. The interchange was a reciprocal arrangement between the lines interested, according to the usual practice, and no charges were assessed for the service. After the creation of the Union the Rock Island and the Burlington interchanged traffic with the tenants of the Union through the medium of the latter but without the payment of intermediate charges. Deliveries by the Rock Island and Burlington were made in the yards of the Union on the west side of the river until 1913, when, at request of the management of the Union, the Rock Island and the Burlington began, and still continue, to haul cuts of cars going to the east-side lines over the Union's rails and bridge to its East Peoria yard. The Union, in turn, hauls cars for the Rock Island and the Burlington into their yards for some distance beyond the point of intersection. Although the M. & St. L. expresses willingness to do so, the Union does not permit the M. & St. L. to deliver cars in the East Peoria yard. The designated place of delivery for cars from the M. & St. L. is in yards 90 and 91. The M. & St. L. asserts that the Union selected that point for delivery to lend color to the claim that in hauling cars arriving on the M. & St. L. from yards 90 and 91 to the East Peoria yard it performs some service for the M. & St. L.

Many contentions and correlative arguments are advanced by the parties interested. The substance of the controversy, however, is this. The Union urges that it is a common carrier, independent in character, entitled on its own account to assess charges for its services. The Rock Island the Burlington, and the M. & St. L., on the other hand, insist that in delivering traffic at the point designated by

[fol. 688] the Union they are performing everything required to be done by ordinary railroad practice; that any service performed or facilities furnished by the Union in the premises are for the benefit of the tenants; and that the present proceedings represent an attempt by the tenant lines to shift to the nontenants a portion of the expense of maintaining the terminal facilities used by the tenants. The suggestion is made on behalf of the Union that the M. & St. L. in withdrawing from the tenancy contract seeks to escape the burden of the interchange expense. The M. & St. L., however, disclaims such a purpose, and contends that as it has constructed yards, and is furnishing power and other terminal facilities, it now is doing for itself at its own expense that for which it formerly employed the Union.

As above indicated, none of the tenants, except the North Western, has any facilities whatever of its own in Peoria, and the lines of some reach no nearer than Pekin. The North Western has a yard in Peoria which is operated for its account by the Union under an arrangement supplementary to the general contract. The North Western, however, has no freight house, team tracks, roundhouse, or other facilities of that character, and uses those of the Union.

The contracts between the Union and its tenants serve as the foundation for many of the contentions advanced by the nontenants. The Union points out that the nontenants are not parties to the contracts and contends that the contracts are the concern only of those bound by ther terms, and that the nontenants can not base rights upon or make claims under instruments to which they are not in privity. Without pursuing the argument further, we think it competent to examine the contracts in connection with other facts and circumstances for what light they may throw upon the status and character of the Union.

The contracts, generally speaking, deal with two subjects, one the acquisition of the right of user of certain facilities by the tenants, and the other the furnishing of transportation service to the tenants by the Union. The preamble of the original contract recites that the four railroad companies therein named—

for the more convenient and economical transaction of their business and the better accommodation of the public, desire to extend and improve their facilities in the city of Peoria * * * and to that end have caused to be organized and incorporated under the laws of the said state of Illinois, the said Peoria and Pekin Union Railway Company * * * the capital stock of which is to be taken, held and owned by the said four constituent companies.

The contract then proceeds to describe generally the properties the ownership or use of which had been acquired by the Union. Some of these properties were owned by the trunk lines which for-[fol. 689] merly served Peoria, but we deem it unprofitable to trace in detail the foreclosure sales and other transactions leading to the acquisition of these original properties of the Union. The welding together of various tracks and facilities into a terminal railroad for

the more economical and convenient handling of terminal business is not unusual. A transaction of a somewhat similar nature is referred to in Omaha Live Stock Exchange v. C., M. & St. P. Ry. Co., 69 I. C. C. 688, where it appeared that a stockyard company had taken over the tracks of certain trunk lines leading to the stockyards and thereafter had performed the switching service between the stockyards and the transfer tracks, assessing for that service a charge which was absorbed in part by the trunk lines.

The original contract which, as before indicated, in essential respects is substantially similar to later ones, describes the facilities which the Union is bound to furnish and maintain. Among them are main tracks, sidetracks, connections, and terminal facilities, a passenger depot, rolling stock, roundhouse accommodations, and freight houses. The contract provides in terms that the Union—

doth let, lease and demise unto * * * (the four railroads therein named), their successors and assigns, all and singular its said main tracks, side tracks, switches, turnouts, connecting tracks, round houses, freight houses, passenger depot, and all its terminal facilities in the cities of Peoria and Pekin * * *.

The habendum clause provides that the lessees shall severally have the right to use, among other things, the following: All main tracks of the Union between their terminals in the cities of Pekin and Peoria, and the necessary sidetracks for passing trains, in running their trains of every class over the same or any part thereof, with their own engines and employees, between Pekin and Peoria, and for the purpose of delivering and receiving their trains and cars to and from the Union, and to and from the Union passenger depot; the roundhouses together with necessary approaches; the freight house or houses and tracks connecting therewith; the Union passenger depot; and elevators, stockyards, and other property and facilities. Payment to the Union of $22,500 per year in the nature of rental is stipulated to be held for payment of interest on the first-mortgage bonds of the Union. Provision is also made for payment to the Union of maintenance cost, apportioned on a wheelage basis, of the main-line tracks and facilities used by the trains and traffic of the tenants; of charges for the transfer service to and from connecting railroads; and for handling and switching loaded and empty cars to and from freight houses, warehouses, packing houses, stockyards, and other industries in the cities of Pekin and Peoria. The contract stipulates also that no stockholder shall transfer its holding of capital stock of the Union without the consent of all [fol. 690] other stockholders; that the board of directors of the Union shall be selected by the proprietary lines and that each shall at all times have equal representation on the board; that no managing officer of the Union shall be selected without the approval of each proprietary line; and that subordinate officers and employees shall be subject to peremptory discharge on request of any party to the contract.

The paragraph of the contract repeatedly referred to by parties herein reads:

The said lessees shall severally have the right to the use of all the transfer tracks, side tracks, switches, and turnouts and other terminal facilities of the first party (the Union) at the said cities of Peoria and Pekin, for the transfer of loaded and empty freight and other cars by the said first party from and to all freight houses, warehouses, packing houses, stock yards grain elevators, distilleries, mills and other industries, and to and from the tracks and warehouses of other railroads, with any of which any of the tracks of the first party shall at any time be connected, whether such tracks or any of them, shall be owned or held or in some other wise controlled by said first party; and the said party of the first part, for the consideration aforesaid, doth hereby covenant and agree, promptly and efficiently and without discrimination or partiality in favor of any company or the business thereof, to make such transfers of the loaded and empty freight and other cars of the said lessees respectively, the said first party hereby reserving unto itself the right to make transfers for all companies and persons desiring such services, without prejudice, however, to the business of the several lessees, and said first party shall also make up and deliver on the main track all freight trains, and at the Union Passenger Depot all passenger trains of the said lessees respectively.

The contention of the M. & St. L. and those identified with it that the rails of the Union are in law and in fact the rails of the tenants can not be sustained. It is clear that the interest of the tenants in the properties of the Union can not be accurately or completely described as a leasehold. Moreover, if the contract were to be considered as giving the right to use as under a lease, the tenants would have the right to make use of as much or as little as they please. Rock Island Railway v. Rio Grande Railroad, 143 U. S. 596, 609.

From the paragraph of the contract last quoted and from other portions thereof mentioned it will be seen that the Union furnishes terminal facilities at Peoria which the tenants otherwise would lack, but that the Union in general is the operating medium for those facilities. The purpose of the Union to retain the transfer service for itself is perhaps more pointedly indicated in some of the later contracts, as for example, the contracts of September 15, 1911, with the Lake Erie; of December 31, 1909, with the Alton; of February 2, 1914, with the Vandalia Railroad Company, predecessor in interest [fol. 691] of the Pennsylania; and of December 1, 1911, with the North Western; which omit the reference to the use of transfer tracks and other facilities from the paragraph relating to transfer service and provide that the Union shall receive on its tracks and terminal facilities in or near the city of Peoria all loaded and empty freight and other cars of the lessee intended for transfer by the Union from and to all freight houses, warehouses, packing houses, stockyards, grain elevators, distilleries, mills, and other industries, and to and from the tracks and warehouses of other railroads. The tenants can not enter upon the Union properties and perform the terminal and intermediate services with their own power. The actual movement

is to be performed by the Union. We find nothing in the contracts militating against the right of the Union to assess a transfer charge. The contracts, indeed, clearly contemplate that the Union shall be compensated for its services and the right of the Union to make transfers for all companies and persons desiring such services is expressly reserved.

In Minneapolis & St. Louis R. R. Co. v. P. & P. U. Ry. Co., supra, we distinguished Southern Pacific Terminal Co. v. I. C. C., 219 U. S. 498, and Chicago, Milwaukee & St. Paul Ry. Co. v. Minn. Civic Assn., 247 U. S. 490, cited in support of the contention that the Union is a mere projection of the rails of the tenants' lines. We again refer to the latter case, which like the Southern Pacific Terminal case presented a question of discrimination between shippers. The court recognized the general principle that ownership alone in one corporation by another does not create an identity of corporate interest between the two companies, or render the stock-holding company the owner of the property of the other, or create the relationship of principal and agent or representative between the two; although it held that a mere fiction of corporate entity could not justify what otherwise would be unlawful discrimination. The court found that the Minneapolis Eastern, a terminal line the capital stock of which was owned jointly by the Chicago, Milwaukee & St. Paul and the Chicago, St. Paul, Minneapolis & Omaha, was in fact the completely controlled agency of the owning companies and that the fact that legal title to certain terminal or spur delivering tracks was in the Minneapolis Eastern could not become the warrant for permitting a charge upon shippers greater than they would be required to pay if the title was in the owning company. As pointed out in Minneapolis & St. Louis R. R. Co. v. P. & P. U. Ry. Co., supra, the facts disclosed in that case are not similar to those here presented. While the proprietary lines are in a position to influence the policies of the Union, the record does not disclose that the Union has been reduced to the status of the Minneapolis Eastern, nor can the Union [fol. 692] be looked upon as a legal fiction devised to cover up discriminatory charges. The Union is a property of some size and does a very considerable business on its own account and in its own right. The decision of the Supreme Court in the Minneapolis Eastern case, as already indicated, was based upon what amounted to discrimination created by the fact that shippers located on the rails of the Minneapolis Eastern were charged for terminal service while those on the rails of the owning company were not charged for similar service. That situation is not here presented. The conditions are in a sense reversed, in that the endeavor is made to hold the Union as a part of the tenant lines in order that certain nontenants may escape an intermediate expense which others are paying. Our treatment of the Union Freight Railroad in Boston Wool Trade Asso. v. Director General, 69 I. C. C. 282, 290, likewise was based on the maintenance of unduly prejudicial charges.

The Burlington and those identified with it insist that the Union is the agent of the tenant lines, and Chicago & A. R. Co. v. Peoria

& P. U. Ry. Co., 250 Ill. 320, 95 N. E. 137, is cited. That case presented a question of liability for loss by theft of goods contained in certain cars transported by the Alton and transferred by the Union, as directed by the Alton, to the Water Street tracks in Peoria where the cars later were broken into and part of the contents stolen. Claims were paid by the Alton, and the cause represented an attempt by that carrier to recover over from the Union. The Supreme Court of Illinois held that the trial court and the appellate court were in error in holding the Union as a warehouseman or bailee for hire. After reviewing the contract between the Union and the Alton, the court concluded that the liability of the Union ended when it completed the service of hauling the cars to the Water Street tracks; that thereafter the cars were in possession of the Alton. That case cannot be regarded as controlling in the present situation. It involved a question of property liability on shipments terminating at Peoria, as to which it is admitted that the Union completed the transportation service for the tenant.

Further in support of their theory of the case the Rock Island, the Burlington, and the M. & St. L. emphasize many circumstances said to indicate that the Union is operated as an agent or instrument of the tenant lines, from which they conclude that in the interchange service the Union acts for the tenant lines and not for its own account. They urge that the interchange business is handled in substantially the same manner as it would be handled if the rails and facilities of the Union were in reality those of the several tenant lines. They contend that the interchange between them and the tenant lines is direct and that they are performing their full duty under [fol. 693] railroad practice in delivering the cars where designated. The Rock Island, the Burlington, and the M. & St. L. insist that the in-and-out charge covers more than the breaking up or making up of trains for the tenants and that we were not justified in finding in Minneapolis & St. Louis R. R. Co. v. P. & P. U. Ry. Co., supra, that the Union performs an uncompensated intermediate service. But the record discloses that the intermediate service is performed without expense to the Rock Island and the Burlington, and the M. & St. L. demands the same treatment. Only in the sense that the in-and-out charges are designed with some elasticity to make the Union whole from its operations can it be said that the Union is compensated.

The circumstances pointed out from which it is urged that the Union has submerged its identity and has become a mere facility of the tenants were fully considered in our former reports dealing with the Peoria situation. For the sake of convenience, settlement on interchange business is made by the trunk lines without the participation of the Union, and it is true that the Union, as a rule, is not shown in tariffs as a participating carrier in connection with the tenants as to business to and from Peoria, or as an intermediate carrier in joint rates through Peoria; nor does it seek to compete with the tenants even when it is shown as an originating carrier from Peoria. These

circumstances do not appear to be of much force. They are sometimes revealed in the practices of other terminal lines.

Reference is made to the fact that in some tariffs published by the tenant lines and in the Official Equipment Register there are certain statements indicating a direct connection at Peoria between the tenant lines and nontenant lines. The tariffs are not uniform in this respect. Some tariffs specifically show connections "via P. & P. U." The record indicates that where reference has been made to connections the information was intended to be conveyed that no intermediate charge is assessed against the shipper. The circumstances stressed by the Burlington and its associates do not destroy the identity of the Union nor make it for all purposes a facility of the tenants. As pointed out in United States v. Brooklyn Terminal, 249 U. S. 296, the relation of connecting carrier with the initial carrier frequently is that of an agent. But, as urged in behalf of the Union, the term "agent" is a broad one. An agency in respect to all matters does not necessarily flow from such a status concerning specific matters. The theory of agency advanced herein could as well be applied to many of the everyday transactions among common carriers. The Rock Island, for example, furnishes certain facilities at Peoria for the M. & St. L. and performs intermediate service between [fol. 694] the M. & St. L. and connections with the Rock Island, for which it assesses a charge, but it could hardly be said that the Rock Island thereby has become the agent of the M. & St. L. at Peoria so as to lose its identity. The carrier delivering shipments to industries on its line, for which service its charges are absorbed by the initial carrier, may be looked upon as an agent of the latter, in that it is completing a service which the initial carrier has taken upon itself to perform. Transactions of that character are common at Peoria and elsewhere. The Union in that aspect of the matter may be regarded as an agent of the Burlington when it makes deliveries to East Peoria industries for which its switching charge is absorbed by the Burlington out of the Peoria rate. So it is with regard to the intermediate service. The tenants and nontenants have established joint rates, but the Union furnishes an essential part of the service which the trunk lines have held themselves out to perform. There is no justification for the belief that the Union under these circumstances is acting for one of the parties to the arrangement to the exclusion of the other.

The Burlington and the Rock Island point out that since 1913 they have hauled cars with their own power to East Peoria for delivery to tenants, and maintain that in no view of the case can it be held that the Union performs any intermediate service in connection with such a movement. In accordance with usual railroad practice, the matter of making and receiving deliveries of cars is the subject of mutual agreement, each line having the right within reasonable limits to designate the point where cars will be received. Under existing arrangements between the Union and the Rock Island and the Burlington, respectively, the latter two carriers deliver cars in the East Peoria yard, and the Union in turn delivers cars to them in their respective yards some distance beyond the actual track

connections. The Union has the right to insist upon receiving traffic from the Rock Island and the Burlington at or in the vicinity of the intersections of their rails in Peoria, to perform the service of transferring such traffic to East Peoria, and to receive compensation for that service. A voluntary reciprocal service arrangement whereby the respective carriers operate over the rails of each other to a greater or less extent does not affect these rights, and it is within the discretion of the parties to discontinue or modify such an arrangement if, because of lack of complete reciprocity or for some other good reason, it should appear desirable to do so. Upon these latter questions we express no opinion.

The St. Louis, Springfield & Peoria, an electric line referred to herein as the Traction, reaches the heart of Peoria by a line paralleling the T. P. & W. from a point near East Peoria. It has no [fol. 695] physical connections with any of the trunk lines in the city of Peoria. It has a track connection with the Union in Peoria near the passenger station, which for operating reasons is not available for the interchange of freight traffic. The Traction has also a physical connection with the Terminal in Peoria and through it with several trunk lines, but this connection, on account of operating difficulties, is said to be an impracticable one at present. As a result of our order in St. Louis, Springfield & Peoria R. R. v. P. & P. U. Ry. Co., supra, a contract was executed by the Traction and the Union relating to interchange of traffic between them, and a connection was constructed at East Peoria. This contract has expired but the parties thereto appear to recognize it as the general basis for operations. Charges paid by the Traction to the Union have fluctuated, the present charge being $4.95 per loaded car, paid by the Traction for the transfer between it and both tenant and nontenant lines in both directions. The charge of $4.95 is not assessed when the traffic pays an industrial switching charge. The distance between the East Peoria yard and the Traction connection with the Union is approximately 0.5 mile. The Traction contends that the charge of $4.95, and that of $4 which was proposed by the Union in Switching Charges at Peoria, supra, are unreasonable and unduly discriminatory as compared with charges assessed by the Union for other services performed in the Peoria district, particularly the free service accorded the Rock Island and the Burlington. The Traction insists that, if the M. & St. L., the Burlington, and the Rock Island are entitled to the intercharge service without cost to them, the Traction should be accorded like service upon similar terms. It is suggested that the Traction labors under an operating handicap in that its electric locomotives can not operate over the rails connecting steam roads to make deliveries, but it is pointed out that the common interchange tracks of the Traction and the Union are in the vicinity of the track connections, rendering it unnecessary for either railroad to enter upon the tracks of the other, and it is urged that no distinction can be based on the fact that the Traction operates by electricity. The Traction supports the proposition that the intermediate charge of the Union should be paid by the line delivering the traffic to the Union.

Much is made of the fact that the tenants, with the exception of the North Western, do not reach Peoria proper over their own rails, although they publish rates to and from Peoria. They have, however, arranged to carry traffic to and from Peoria proper in connection with and in certain respects by the use of the facilities of the Union. The M. & St. L. in that aspect of the matter is in much the same position as the tenants, as most of its properties are without the [fol. 696] municipal limits of Peoria. Indeed, it is only by virtue of the extension of the municipal limits within comparatively recent years that the M. & St. L. has any trackage whatever in Peoria. The M. & St. L. after its withdrawal from its arrangement with the Union was obliged to obtain the use of certain facilities of the Rock Island in order to do business in Peoria. It must not be supposed that East Peoria is remote from Peoria; the two localities are separated geographically only by the Illinois River. Peoria and East Peoria, including the East Peoria yard, are within the same switching district, and the trunk lines reach the various industries throughout the district by absorbing the switching charges within the limitations of their absorption rules. Thus it may be said that the M. & St. L., the Burlington, and the Rock Island to that extent serve East Peoria as well as Peoria. There are strong indications that in railroad practice no distinction is drawn between Peoria and East Peoria, the whole commonly being understood to be included in the term "Peoria." Certain rates and divisions are published as applying through Peoria, although the movement is entirely through East Peoria, and Peoria is usually shown as the point of origin or destination in the billing of shipments moving from and to industries in East Peoria.

It is a common experience that the growth in population and commercial importance of industrial and transportation centers has resulted in the construction of large yards removed from the centers of the business sections of such communities. Traffic, of course, must be moved to some place reasonably and conveniently situated for the purpose of the transportation. So far as interchange traffic is concerned the record is convincing that the east-side lines have completed their obligations relating to the line-haul service by bringing the cars to East Peoria. Moreover, the result would not be different if the east-side lines, by obtaining a trackage arrangement with the Union, were to haul cars past the convenient and suitable facilities of the East Peoria yard to some yard in Peoria. There still would be necessity for the intermediate service of the Union.

Some of the parties devote much attention to divisions, and at this point it may be stated that witnesses frequently offered the opinion that it is not a practicable or desirable solution of the problem for the Union to be made a party to joint rates from which it would be accorded divisions, their view being that a charge per car should be fixed to cover the service performed by the Union, to be absorbed by the trunk lines out of their rates or divisions. The concurrence of the Union in joint rates and the receiving by it of divisions, however, would not preclude the statement of the amounts of such divisions as charges per car.

[fol. 697] The divisions through the Peoria gateway in many instances are the same as, and were made with relation to, those through Chicago. Divisions were negotiated without the participation of the Union and without considering terminal or intermediate expense at Peoria. The west-side lines, the M. & St. L., the North Western, the Burlington, and the Rock Island, as a rule have the same divisions through Peoria. The North Western, it will be recalled, is a tenant of the Union, as was also the M. & St. L., or rather its predecessor in interest, the Iowa Central, when the divisions were negotiated.

The Burlington and the Rock Island state that their divisions were established when they were paying no intermediate charge, and that their divisions are net to them at Peoria as distinguished from the Peoria district. They contend that the effort to impose an intermediate switching charge is in effect an indirect attempt to reduce their divisions for the benefit of the east-side tenant lines. The argument is advanced that a double charge is sought to be collected, in that compensation is asked for a service between Peoria and East Peoria included in the divisions accorded to the east-side lines, for which the Union, it is contended, is compensated under the contracts. It is apparent that the position of the Burlington and Rock Island with respect to divisions does not assist the M. & St. L., as the later, or its predecessor in interest, was a tenant and clearly was bearing a part of the intermediate expense when the divisions were arranged. Consequently, if the payment of intermediate charges by the Burlington and Rock Island should be regarded as a disturbance of existing divisional arrangements, the withdrawal of the M. & St. L. and its refusal to pay any part of the intermediate expense served to that degree to increase its divisions.

There is some substance to the position of the Burlington and the Rock Island that payment to the Union for intermediate service would result in a measure in the diminution of their divisions. Reciprocal Switching at Kansas City, 68 I. C. C. 591, 596. Manifestly such payments would come out of their divisions of joint rates or from their locals or proportionals in case of combinations on Peoria. But that would be merely incidental. While divisions, in the first instance, are properly the concern of the carriers, we have certain jurisdictions with regard to them, the exercise of which requires the consideration of many factors not adequately covered by the present record. This deficiency precludes a consideration of the matter of divisions at this time. We also have jurisdiction, however, over discriminations by carriers against their connections as well as against shippers. Pennsylvania Company v. United States, 236 U. S. 351, St. Louis, Springfield & Peoria R. R. v. P. & P. U. Ry. Co., supra. Our power in the premises [fol. 698] is not circumscribed or limited because in the exercise thereof the matter of divisions incidentally may be affected. If readjustment of divisions should be sought as a result of the present case, steps may be taken to that end, and if necessary the matter may be again brought to our attention. For the present we consider the immediate problem at Peoria.

The record does not lack indicia of unjust discriminations and undue prejudices in the present Peoria situation. We have already found in Minneapolis & St. Louis R. R. Co. v. P. & P. U. Ry. Co., supra, that assessing a charge for the interchange service between East Peoria and the rails of the M. & St. L. and of the Terminal, while contemporaneously performing a similar interchange service from the rails of the Rock Island and Burlington, respectively, without charge, would be unjustly discriminatory and unduly prejudicial and we find no occasion to disturb that finding. No valid distinction can be drawn between the Burlington and the Rock Island, on the one hand, and the M. & St. L., on the other, with regard to this interchange service. It is true that the M. & St. L. formerly was a party to the Union contracts but it has withdrawn therefrom, as admittedly it had the right to do, and has acquired other terminal facilities and in that respect is in somewhat the same position as the Burlington and the Rock Island. The M. & St. L. pays the Rock Island for the intermediate service from its rails to the rails of the Burlington while denying the right of the Union to assess a charge from the rails of the M. & St. L. to connections with the tenants. The right of the Union to assess an intermediate charge between the so-called nontenants is recognized. The circumstances of carriage are not shown to be materially different between nontenants on the one hand and tenants and nontenants on the other. Again, both the Rock Island and M. & St. L. have arrangements for bearing the intermediate charge of the Terminal, competitor of the Union, between their respective lines and the Alton. It is interesting to note that the Rock Island, although with the Alton a joint owner of the Terminal, makes little use of the facilities of the Terminal for intermediate service because, the record indicates, it is considered more advantageous to use the services of the Union without charge. The Traction which, like the Rock Island and the Burlington, has its own terminals in Peoria, is assessed an intermediate charge in each direction on interchange traffic.

The Union endeavors to show that the expansion of its facilities has been of benefit to the Rock Island and the Burlington as well as to the tenants, in that the Rock Island and the Burlington have been able to handle their increasing business in Peoria over a period of years without greatly enlarging their facilities in Peoria. This [fol. 699] theory is sharply opposed by the Burlington and the Rock Island, the facilities of which, it is insisted, are sufficient for their ordinary needs. It is uncertain whether the development of the Union has been of particular benefit to the Rock Island and the Burlington and has made it possible for them to serve Peoria with properties otherwise inadequate, but it is clear that the expansion of the Union and its facilities has been of marked benefit to the public.

Representatives of commercial and shipping interests of Peoria are not interested in the controversy among the trunk lines as to who shall bear the intermediate charges, but they point out that, as indicated in Switching Charges at Peoria, supra, the present absorption rules of the carriers are not broad enough in all cases to

cover the intermediate charges of the Union, and they ask that we approve nothing which will result in increased charges to shippers. It is generally agreed that in the case of joint rates applying via Peoria the intermediate charge of the Union could not, in the absence of appropriate tariff provisions, be shifted to the shipper, as the participating carriers would be obliged to protect their joint rates. There are also instances where the Union is shown as a participating carrier to and from Peoria.

The tenant lines were made parties to the present record, and their respective positions have been developed. In general, they find common ground with the Union in urging that the intermediate expense should be borne by each line in one direction, that is, by the delivering line. With regard to what should be the practice at Peoria, stress is laid upon U. S. War Department v. A. & S. Ry., 77 I. C. C. 317, 359, where it is said:

It is the usual practice of rail carriers participating in joint rates to divide the switching expense when the services of an intermediate carrier are utilized in effecting interchange, the switching charge being absorbed by one or the other of the carriers according to the direction in which the traffic moves.

The North Western has a tariff provision specifically covering intermediate transfer as indicated by the following:

Joint through rates applying via Peoria or local or proportional rates to Peoria will include the cost of transfer or intermediate service on all freight delivered to other lines at Peoria.

The position of the Alton is not entirely in accord with that of the other tenant lines. Relations between it and the Union are decidedly inharmonious. Disputes exist with respect to the measure and the legality of charges assessed against the former and other matters, some of which are now before the courts. Negotiations are under way looking toward the execution of a new contract between the Union and the Alton to replace the one which has expired. The Alton and the Terminal, a competitor of the Union for interchange [fol. 700] business, take many exceptions to the Union's form of contract, and the Alton asks us to fix the terms and conditions upon which the Alton may use the terminal facilities of the Union.

The Alton contends that under section 1(15) of the interstate commerce act we have the power to fix the terms and conditions under which the Alton may use the facilities of the Union. That portion of the act, however, relates to emergencies, and the present situation is not shown to be an emergency within the meaning of the act. By section 3(4) we are empowered in a proper case to require the use of terminal facilities by a carrier other than the owning carrier. But we are of the view that a record has not been made justifying the exercise of our jurisdiction in that regard. Negotiations between the Union and the Alton are still pending, and, in the event they fail, the matter of the use of the Union's facilities can be brought up in an orderly manner by a proper proceeding.

There is a tendency on the part of representatives of several tenants to advocate, in a measure at least, the abandonment of the contracts so far as they relate to transportation service. The suggestion is offered that charges for transportation service should be prescribed by published tariffs rather than by contracts. The witnesses, however, are not entirely in accord as to what should be considered transportation charges. Some are of the belief that the service of breaking up and making up of tenant's trains should be considered as on a basis different from the interchange service, provision to be made for the former by contract and for the latter by tariffs. Others are of the opinion that the service of making up and breaking up trains is merely incidental to and should be included in switching charges.

We have found that the Union is an independent common carrier. As such it is entitled to assess reasonable and otherwise lawful charges for transportation services which it renders. Such charges should be filed and published in accordance with the provisions of section 6 of the act. Ordinarily the service of making up and breaking up trains is an operating incident compensation for which is included in the transportation rate. In view of the situation here existing, however, where the make-up and break-up service is rendered in some instances and not in others, and in still others is the only service performed by the Union, it is our opinion that the charge for that service should be separately stated. Where the Union performs an intermediate service in connection with traffic moving through Peoria at joint rates, it should concur in such joint rates and receive divisions thereof, the divisional arrangements to be so adjusted as to, in effect, result in the absorption of the Union's division by the line that delivers the traffic to it. This overrules [fol. 701] Conf. Ruling 341. We further find that the charges proposed from the rails of the Terminal and the practice of the Union in assessing charges for the interchange service between connections with its tenants and the rails of the M. & St. L. and the Traction, while contemporaneously performing a like service between connections with its tenants and the rails of the Burlington and the Rock Island without charge, are unjustly discriminatory and unduly prejudicial against the M. & St. L., the Terminal, and the Traction, and that increased charges to shippers under joint rates through Peoria or under combination rates breaking on Peoria have not been justified.

The principal parties to the record have been so concerned with what were conceived to be their rights in the premises that slight interest apparently has been shown in the amount of the charges for the services of the Union. While not unmindful of the controversial character of these proceedings, we believe that the existing unsatisfactory terminal situation at and near Peoria can be corrected by the carriers by the exercise of a spirit of mutual accommodation such as has been displayed at other important terminals. No order will be entered at this time, but the carriers will be expected to arrange promptly for the solution of existing Peoria

terminal difficulties along the lines indicated herein. The record will be held open for 60 days for this purpose. If the matter can not be rectified, it should be brought to our attention before the expiration of this period for further action in the premises.

Case of Clark Coal & Coke Company

The Clark Coal & Coke Company filed a petition in intervention and introduced some testimony directed against the local coal rates of the M. & St. L. The Clark Company's mines are located without the Peoria switching limits on the rails of the M. & St. L. about 3.5 miles from Iowa Junction in Peoria. It must sell its coal in competition with mines located on the Terminal and the Union. The M. & St. L. applies local rates for the movement to Peoria even when the shipments are destined beyond. The Clark Company maintains that the service performed is essentially a switching service and that the rates of the M. & St. L. are unreasonabl and unduly prejudicial as compared with a switching charge of $6.30 per car maintained by the Terminal and the Union from mines on their lines to connections with other lines at Peoria and East Peoria for movement beyond. The M. & St. L. points out that it has no control over the charges of either the Terminal or the Union, and its position in general is that the switching charge of those lines is too low and that the Union in moving this traffic on what is said to be a low basis is ignoring an important source of revenue.

[fol. 702] The evidence in this matter throws no light on the questions raised by this investigation, and we are of opinion that the relief prayed is not properly within the scope of this proceeding.

HALL, Chairman, concurring:

In the main I am in accord with the majority findings, but to my mind the Union in some instances is acting for one of the parties, not for both, and on the traffic brought into the Peoria-East Peoria switching district by the respective carriers the M. & St. L., Terminal, and Traction are not unduly discriminated against, or unduly prejudiced, by reason of the existing interchange arrangements of the Burlington and Rock Island.

The principle underlying the majority conclusions is that it is the duty of the line-haul carrier bringing through traffic into the Peoria-East Peoria switching district to effect delivery thereof to the line-haul carrier which is to take the traffic out of that district. All of the service now being performed by the Union on westbound traffic interchanged with the Burlington and Rock Island is obviously performed only for the east-side lines, because the latter are charged with the delivery. In the reverse direction the Burlington and Rock Island perform the interchange service themselves by delivering the cars directly into the East Peoria yard. There the line-haul service of the east-side lines begins and nothing further remains to be done to effect the interchange. There also the Union makes up outgoing trains for the east-side lines, and the breaking

up of the cuts received from the Burlington and Rock Island is merely an incident of that make-up under the existing arrangements.

The Union performs no switching on such eastbound traffic and it can not properly assess a switching charge therefor against those carriers. This situation is clearly distinguishable from that obtaining with respect to traffic brought into this switching district by the M. & St. L., Terminal and Traction. It is likewise the duty of the latter lines to effect the interchange of such traffic with their connections. They do not themselves perform the interchange service, and they should compensate the Union therefor if the Union performs it. The M. & St. L., Terminal, and Traction are not unduly prejudiced by having to pay the switching charges of the Union for its intermediate service in completing delivery of through traffic from these lines to their connections in the switching district. The findings of unjust discrimination against and undue prejudice to those lines should be confined to the reverse movement and affect only interchange-switching charges assessed by the Union against those lines on through traffic which it brings to them as an inter-[fol. 703] mediate switching carrier in completing delivery by and for their connections in the district.

I am not persuaded that switching services in terminals on through traffic may not properly be covered by switching charges published as such and absorbed in whole or in part by the line-haul carriers. To require that such switching should in all instances be covered by a joint rate in which the switching carrier is a participant with the line-haul carriers and is compensated by divisions of the joint rate seems to me an unnecessary refinement, not justified by experience, supported by this record, or imposed by law. It is therefore my view that Conference Ruling 341 should not be abrogated, or overruled as is done by the majority.

George B. McGinty, Secretary. (Seal.)

A true Copy. (Signed) George B. McGinty, Secretary.

(Seal Interstate Commerce Commission.)

[fol. 704] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT "E"

State of Iowa, Office of the Secretary of State

I, W. C. Ramsay, Secretary of State of the State of Iowa, keeper of the corporate records of the State, do hereby certify that the attached instrument in writing is a true and correct copy of articles of incorporation of the Minneapolis & St. Louis Railroad Company of Des Moines, Iowa, and Iowa Central and Western Railway Company, together with amendments thereto, as appear of record in this office.

In testimony whereof, I have hereunto set my hand and affixed the official seal of the Secretary of State at the Capitol, in Des Moines, this Sixth day of February A. D. nineteen hundred and twenty-three.

(Sgd.) W. C. Ramsay, Secretary of State. (Seal of Secretary of State of State of Iowa hereto affixed.)

[fol. 705] The Minneapolis & St. Louis Railroad Company and Iowa Central and Western Railway Company

Consolidation Agreement, Dated May 10, 1916

[fol. 706] Consolidation Agreement

Agreement dated May 10, 1916, by and between:

The Minneapolis & St. Louis Railroad Company (hereinafter called the Minneapolis Company), party of the first part; and

Iowa Central & Western Railway Company (hereinafter called the Iowa Company), party of the second part;

Whereas, the Minneapolis Company is a corporation duly organized and existing under the laws of the states of Iowa and Minnesota, and has outstanding capital stock of the par value of $22,651,000, divided into 226,519 shares of the par value of $100 each, of which 62,651 shares are preferred stock and 163,859 shares are common stock; and

Whereas, the Minneapolis Company owns and operates various lines of railroad in the States of Iowa, Minnesota, Illinois and South Dakota, and also holds and operates under lease the railroad of the Iowa Company; and

Whereas, the Iowa Company is a corporation duly organized and existing under the laws of the State of Iowa, and has outstanding capital stock of the par value of $918,000 divided into 9,180 shares of the par value of $100 each, of which 9,000 are owned by the Minneapolis Company subject to the pledge and assignment thereof under the following mortgages, viz:

(1) Mortgage dated March 1, 1901, executed and delivered by the Iowa Central Railway Company to Morton Trust Company as trustee (hereinafter called the First and Refunding Mortgage of the Iowa Central Railway Company); Union Trust Company of New York being now the successor trustee under said mortgage; and

(2) Mortgage dated January 1, 1921, executed and delivered by the Minneapolis Company to Guaranty Trust Company of New York as trustee (hereinafter called the Refunding and Extension Mortgage of the Minneapolis Company); and

Whereas the Iowa Company is the owner of a certain line of railroad in the State of Iowa which connects with the lines of railroad of the Minneapolis Company at or near Belmont, in the County of

[fol. 706a] Franklin, State of Iowa, and at or near Corwith, in the County of Hancock, State of Iowa, and which is held and operated under lease by the Minneapolis Company; and

Whereas the lines of railroad of the Minneapolis Company and of the Iowa Company form a continuous line of railroad with each other and admit of the passage of trains over them without break or interruption, and said lines of railroad are not parallel or competing; and

Whereas the Minneapolis Company and the Iowa Company are respectively duly authorized by the laws of the States of Iowa and Minnesota to merge and consolidate their respective capital stocks, franchises and properties; and

Whereas it is necessary and desirable in the interest of the Minneapolis Company and of the Iowa Company and of the stockholders of the Minneapolis Company and of the Iowa Company that said companies should merge and consolidate their respective capital stocks, franchises and properties as set forth in this agreement, and that additional moneys should be provided for the payment of outstanding indebtedness and liabilities of said companies and for their other lawful corporate purposes and said moneys can be provided only through the consolidation of said companies as herein set forth;

Now, therefore, this agreement witnesseth:

That in consideration of the premises and of the mutual covenants herein contained and of the sum of Five Dollars by each of the parties hereto to the other in hand paid and of other good and valuable considerations, the receipt whereof is hereby acknowledged, it is hereby mutually covenanted and agreed by and between the parties hereto, each covenanting for itself, its successors and assigns, that they will and hereby do unite their respective capital stocks, franchises and properties, and will and do hereby make a full transfer of their respective railroads, properties and franchises to the new corporation hereinafter named, and will and do hereby make [fol. 706b] as full and complete a merger and consolidation as possible of their respective corporations, stocks, franchises, properties, earnings and management under the name of "The Minneapolis & St. Louis Railroad Company," to be a corporation of the State of Iowa, in the manner following, that is to say:

1. The Minneapolis Company and the Iowa Company do severally agree that from and after the first day of July, 1916, the entire railroad properties and franchises of every kind now held by said companies respectively, and all railroads, properties and franchises hereafter acquired in any way by either of said companies shall be forever owned, held and operated jointly as one line of railroad and as joint estate to be managed and controlled under the name of "The Minneapolis & St. Louis Railroad Company" of Iowa upon the terms hereinafter named and by the board of directors constituted as hereinafter provided; and that the stockholders of the respective companies parties hereto shall be entitled to exchange

the stock held by them in each of the companies parties hereto for stock of the said "The Minneapolis & St. Louis Railroad Company" of Iowa in the proportions, upon the terms and subject to the conditions hereinafter named, and that the certificates of stock in said new company to be issued as provided in this agreement shall be full and the only evidence of the rights of the aforesaid stockholders to participate in the property, assets, earnings and income of the new company, and shall be full paid and non-assessable stock, and the private property of the stockholders of the new company shall be exempt from the corporate debts of said company. No stockholder of the Minneapolis Company or of the Iowa Company shall have any right in or to the property, assets, earnings or income of the said new company except upon the exchange of the stock of the Minneapolis Company or of the Iowa Company held by him as the case may be for stock of said new company as provided in this agreement and then only to the extent and subject to the conditions herein set forth.

II. The Minneapolis Company and the Iowa Company do hereby severally agree that from and after said first day of July, 1916, they shall become and shall be forever merged and consolidated into one [fol. 707] new or consolidated company or body corporate under the name of "The Minneapolis & St. Louis Railroad Company," a corporation of the State of Iowa, and by that name shall have and use a corporate seal, shall sue and be sued, plead and be impleaded, contract and be contracted with, and shall use, enjoy and exercise all the rights, powers and franchise of each of the said corporations parties hereto. The said new company formed in pursuance of this agreement is hereinafter referred to as the Consolidated Company. The corporate existence of the Consolidated Company shall commence on said first day of July, 1916, and shall continue for the period of fifty years from said date, but the same may from time to time be renewed or extended as provided by law.

III. The Minneapolis Company and the Iowa Company respectively further agree that from and after said first day of July, 1916, the entire railroads, properties and franchises of every kind of the parties hereto severally, and all the railroads, properties and franchises to which the parties hereto severally are or hereafter may be entitled shall be forever owned, held and operated jointly as one line of railroad to be managed and controlled by the Consolidated Company, and that all the property and assets, real, personal and mixed, and all the rights, privileges, franchises, immunities, credits, grants, donations, easements and interests belonging to the parties hereto severally or to which either of the said parties hereto severally or to which either of the said parties shall be at any time entitled, shall become and be the property and be vested in the Consolidated Company, subject, however, to the provisions of Article V of this agreement. The Consolidated Company shall be empowered to borrow money, and for that purpose to issue bonds, notes and other obligations and to secure the payment of the same by mortgage or

pledge on the property and franchises of each of the parties hereto, and to sell said bonds, notes and other obligations at any rate not contrary to law, and also to purchase, lease and construct other connecting and continuous lines of railroad, to construct and purchase bridges, and to purchase and hold the stocks and bonds of other railroad, bridge or transportation companies or telegraph companies, and to consolidate its stock, franchises and property therewith, and the Consolidated Company shall at all times be empowered to use [fol. 708] the name of either of the companies parties hereto in all ways and for all purposes whenever the same shall be necessary or convenient in the conduct and extension of the railroads, business and property hereby merged and consolidated. The highest amount of indebtedness or liability to which the Consolidated Company shall at any time subject itself shall be such amount as may at the time be permitted by the laws of the State of Iowa.

IV. The Minneapolis Company and the Iowa Company in consideration of the premises do further severally and each of them does hereby agree to and does hereby grant, bargain, sell, release, enfeoff, convey, assign, remise, confirm, transfer and set over unto the Consolidated Company all and singular their and each of their respective railroads, properties and assets, real, personal and mixed, and their and each of their respective franchises, rights, easements, immunities and exemptions, and their and each of their resepctive earnings, tools, income and things in action at law or in equity, whether the same are now held and possessed or hereafter acquired, and whereever situated and however held, to have and to hold the same unto the Consolidated Company for its own use, benefit and behoof forever, and each of the parties hereto does hereby further agree to make, execute and deliver from time to time all deeds, grants, assignments, contracts, agreements, instruments and transfers necessary or convenient to carry fully into effect the covenants hereof, and to vest as fully in law as may be all its property, franchises, rights and immunities as aforesaid in the Consolidated Company.

V. The Minneapolis Company and the Iowa Company do hereby further severally agree that, except as herein otherwise expressly provided, all the debts, liabilities and obligations of each of the parties hereto shall be deemed and taken and they are thereby declared to be from and after the first day of July, 1916, the debts, liabilities and obligations of the Consolidated Company, provided, however, that the property, assets, and franchises of the Iowa Company shall be vested in the Consolidated Company subject only to a lien, first, in favor of Union Trust Company of New York as successor trustee under the First and Refunding Mortgage of the Iowa Central Railway Company, and second, in favor of Guaranty [fol. 709] Trust Company of New York, as trustee under the Refunding and Extension Mortgage of the Minneapolis Company, as additional security for the bonds issued under and secured by said respective mortgages in the order of their priority in the same man-

ner and with the same effect as if the property, assets and franchises of the Iowa Company had been included in and covered by the said respective mortgages when originally executed; and such lien shall be prior to the lien of all other debts, obligations and liabilities except such as shall have been contracted or incurred by the Iowa Company and shall be outstanding at the date of the consolidation herein provided for. The directors and officers of the Consolidated Company are hereby authorized and directed forthwith to execute, acknowledge and deliver to the said Union Trust Company and to the said Guaranty Trust Company of New York such further deeds and instruments as may be necessary to make the said lien effective as hereby intended.

VI. The estate and affairs of the Consolidated Company shall be managed by a board of nine directors, who shall elect from time to time a president two or more vice-presidents, a treasurer, a secretary and such other officers as may be provided for in the by-laws of the Consolidated Company and as may be determined by the said board of directors to be necessary or advisable.

The names and places of residence of the directors and officers of the Consolidated Company for the first year shall be as follows:

Directors	Residence
Newman Erb	New York City, N. Y.
F. H. Davis	Elizabeth, N. J.
Frank P. Frazier	New York City, N. Y.
A. C. Doan	New York City, N. Y.
Ward E. Pearson	New York City, N. Y.
Wm. J. Wollman	New York City, N. Y.
T. P. Shonts	New York City, N. Y.
H. E. Huntington	Los Angeles, California.
Frank Trumbull	New York City, N. Y.

Officers	Residence
President, Newman Erb	New York City, N. Y.
Vice-President and Treasurer, F. H. Davis	Elizabeth, N. J.
[fol. 710] Vice-President and General Manager C. W. Huntington	Minneapolis, Minn.
Secretary, A. C. Doan	New York City, N. Y.

The terms of office of the said directors shall continue until the first Tuesday in October, 1916. The said officers shall hold office for the same period, but any of said officers may be removed at any time by vote of the board of directors.

After the first year the directors shall be chosen at the annual meeting of the stockholders of the Consolidated Company to be held at the office of the Consolidated Company in the City of Des Moines, State of Iowa, on the first Tuesday of the month of October in each year, and shall hold office for the term for which they shall be chosen. The board of directors shall be divided into three classes, the term of

office of directors of the first class to expire at the annual meeting next ensuing, of the second class one year thereafter and of the third class two years thereafter, and at each annual election directors shall be chosen for the full term as the case may be to succeed those whose terms expire. Any vacancy in the board of directors occurring by death, resignation or otherwise may be filled by the vote of a majority of the board.

The by-laws, rules and regulations of the Minneapolis Company are hereby adopted and shall hereafter be the by-laws, rules and regulations of the Consolidated Company until the same shall be modified or changed, repealed or rescinded.

The board of directors of the Consolidated Company shall have full power and control over all the assets and property hereby transferred to the Consolidated Company, and shall exercise all the powers corporate and other of the Consolidated Company as the successor of each of the companies parties hereto, and may make and adopt other by-laws prescribing the duties of the officers of the company and regulating the transaction of the company's affiairs, and may by proper action modify the by-laws herein adopted, and said board of directors may and shall have and are hereby invested with all the powers and authority conferred upon, vested in or exercised by the board of directors of either of the parties hereto.

[fol. 711] VII. The principal office and place of business of the Consolidated Company shall be in the City of Des Moines, County of Polk, State of Iowa.

VIII. The Consolidated Company shall have a total capital stock of $26,000,000, divided into 260,000 shares of the par value of $100 each, all of one class, but the amount of said capital stock of the Consolidated Company may from time to time be increased by it as provided by law. Each of the holders of the stock of the Consolidated Company shall be entitled to one vote for each share of stock held by such stockholder respectively at every election of directors of the Consolidated Company and upon all other matters that may be acted upon at any meeting of the stockholders of the Consolidated Company.

IX. The shares of stock of the Minneapolis Company and of the Iowa Company shall be converted or exchanged into or for stock of the Consolidated Company in the manner and upon the terms herein set forth, viz:

The Consolidated Company shall issue and deliver to the Minneapolis Company $22,651,000 par value, and to the Iowa Company $9,000 par value, of the capital stock of the Consolidated Company.

(1) $17,793,100 par value of the capital stock of the Consolidated Company to be delivered by it to the Minneapolis Company as aforesaid, shall be offered by the Minneapolis Company, in such manner and within such time as may be determined by the board of directors of the Minneapolis Company, for sale to the stockholders of the

Minneapolis Company in the proportion and at the rates following, viz:

(a) To each holder of preferred stock of the Minneapolis Company, for each $100 par value of preferred stock held by him $80 par value of stock of the Consolidated Company for the sum of $20 in cash;

(b) To each holder of common stock of the Minneapolis Company, for each $100 par value of common stock held by him, $78 par value of stock of the Consolidated Company for the sum of $20 in cash.

[fol. 712] To the extent that said stock of the Consolidated Company shall not be subscribed for and purchased by the stockholders of the Minneapolis Company as aforesaid, within the time limited therefor, said stock may be sold by the Minneapolis Company to such other persons and at such rates as may be determined by the board of directors of the Minneapolis Company.

Out of the proceeds of the sale of said $17,793,100 par value of stock of the Consolidated Company, the Minneapolis Company shall pay or cause to be paid to or upon the order of the Consolidated Company the sum of $4,180,200, and the Consolidated Company shall thereupon issue and deliver to the Minneapolis Company $3,132,600 par value additional of the capital stock of the Consolidated Company.

Said $3,132,600 par value of capital stock of the Consolidated Company, together with $4,857,900 par value of the capital stock of the Consolidated Company theretofore delivered by the Consolidated Company to the Minneapolis Company, shall be delivered by the Minneapolis Company, in such manner as may be determined by the board of directors of the Minneapolis Company, to the stockholders of the Minneapolis Company in the following proportions in conversion and exchange for and upon the surrender by said stockholders of the shares of stock of the Minneapolis Company held by them respectively without payment by them therefor, viz:

(a) To each holder of preferred stock of the Minneapolis Company, for each $100 par value of preferred stock held by him, $70 par value of stock of the Consolidated Company;

(b) To each holder of common stock of the Minneapolis Company, for each $100 par value of common stock held by him, $22 par value of stock of the Consolidated Company.

(2) The $9,000 par value of capital stock of the Consolidated Company to be delivered by it to the Iowa Company shall be delivered by the Iowa Company in such manner as may be determined by the board of directors of the Iowa Company to the stockholders of the Iowa Company other than the Minneapolis Company in the following proportion, in conversion and exchange for [fol. 713] and upon the surrender by said stockholders of the shares of stock of the Iowa Company held by them respectively; viz.:

To each stockholder of the Iowa Company, other than the Minneapolis Company, for each $100 par value of stock held by him, $50 par value of stock of the Consolidated Company.

All shares of stock of the Minneapolis Company and of the Iowa Company surrendered for exchange as aforesaid shall be cancelled and delivered to the Consolidated Company. The Minneapolis Company agrees that it will cause to be cancelled and delivered to the Consolidated Company the shares of stock of the Iowa Company owned by the Minneapolis Company as hereinbefore set forth.

X. This agreement shall be perpetual, and each of the parties hereto and the Consolidated Company shall have the power, cooperating together, to perform every act and to do everything which they may be advised as necessary or proper to carry into effect and more fully complete the perpetual uniting, merger, amalgamation and consolidation of the parties hereto on the terms herein provided; and this agreement shall become effectual when approved by holders of three-fourths in amount of the outstanding shares of the capital stock of each of said parties. The corporate existence of the Minneapolis Company and of the Iowa Company respectively shall continue for such time and to such extent as may be necessary to carry into effect the provisions of this agreement and when the same shall have been fully carried into effect said companies shall be dissolved.

XI. It is expressly agreed that a failure in law to carry into effect the intention of this agreement, or any part thereof, as hereinbefore expressed, shall not render void any part or portion of this agreement that is in itself valid, but that all the valid covenants of this agreement shall be binding and obligatory upon each of the parties hereto, and this agreement and each part thereof shall take effect so far as the same is lawful and authorized notwithstanding the avoidance or invalidity of any other part thereof; and that in the event of [fol. 714] any such failure such steps shall be taken and such contracts shall be made as shall be advised by counsel to carry into effect as far as possible the intents and purposes of this agreement.

In witness whereof the said parties hereto have caused their respective corporate seals to be affixed to this agreement of consolidation, and the same to be signed by their respective Presidents or Vice-Presidents, and attested by their respective Secretaries or Assistant Secretaries.

The Minneapolis & St. Louis Railroad Company, by Newman Erb, President. Attest: A. C. Doan, Secretary. (Corporate Seal.) Iowa Central & Western Railway Company, by F. H. Davis, Vice-President. Attest: A. C. Doan, Assistant Secretary. (Corporate Seal.)

STATE OF NEW YORK,
County of New York, ss:

I, E. A. Adams, a Notary Public in and for the City, County and State aforesaid, duly commissioned as such and duly authorized to

take and certify acknowledgments and proofs of deeds and conveyances of land in said State, do hereby certify that on this 12th day of May, 1916, before me personally appeared Newman Erb and A. C. Doan, to me personally known and known to me to be said Newman Erb, President, and the said A. C. Doan, Secretary, of The [fol. 715] Minneapolis & St. Louis Railroad Company, one of the corporations described in and which executed the foregoing instrument, and known to me to be the same identical persons whose names are subscribed to the foregoing instrument as such President and Secretary, respectively, and they severally duly acknowledged to me that they signed, sealed and delivered the said instrument as their free and voluntary act and deed and as the free and voluntary act and deed of said The Minneapolis & St. Louis Railroad Company, and that such corporation executed the same for the consideration, duties and purposes therein set forth.

And on said 12th day of May, 1916, the said Newman Erb and A. C. Doan, being by me severally duly sworn, did depose and say, the said Newman Erb that he is the President, and the said A. C. Doan that he is the Secretary, of The Minneapolis & St. Louis Railroad Company, one of the corporations described in and which executed the foregoing instrument; that they resided, the said Newman Erb in the City of New York, N. Y., and the said A. C. Doan in the City of New York, N. Y.; that they knew the corporate seal of said corporation; that the seal affixed to said instrument is the corporate seal of said corporation and that said seal was so affixed and said instrument was signed, sealed and delivered in behalf of said corporation by authority of its Board of Directors, and that they respectively signed their names thereto by like authority.

In witness whereof, I have hereunto set my hand and affixed my official seal this 12th day of May, 1916.

E. A. Adams, Notary Public, Kings Co., No. 30. Reg. off. No. 8028. Certificate filed in N. Y. Co., No. 58. Reg. off. No. 8066. (Seal.)

No. 12342, Series B

State of New York,
County of New York, ss:

[fol. 716] I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, that E. A. Adams whose name is subscribed to the deposition or certificate of the proof or acknowledgement of the annexed instrument, and thereon written, was, at the time of taking such deposition or proof and acknowledgement, a Notary Public, acting in and for the said County, duly commissioned and sworn, and authorized by the laws of said State to take depositions and also acknowledgments and proofs of Deeds, or conveyances for land, tenements or hereditaments in said

State of New York. That there is on file in the Clerk's Office of the County of New York, a certified copy of his appointment and qualification as Notary Public of the County of Kings with his autograph signature. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition, or certificate of proof or acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of the said Court and County this 13 day of May 1916.

Wm. F. Schneider, Clerk. (Seal.)

(10 I. R. S. cancelled.)

STATE OF NEW YORK,
County of New York, ss:

I, E. A. Adams, a Notary Public in and for the City, County and State aforesaid, duly commissioned as such and duly authorized to take and certify acknowledgments and proofs of deeds and conveyances of land in said State, do hereby certify that on this 12th day of May, 1916, before me personally appeared F. H. Davis and A. C. Doan, to me personally known and known to me to be the said F. H. Davis, Vice President, and the said A. C. Doan, Assistant Secretary, of Iowa Central & Western Railway Company, one of the corporations described in and which executed the foregoing instrument and [fol. 717] known to me to be the same identical persons whose names are subscribed to the foregoing instrument as such Vice-President and Assistant Secretary, respectively, and they severally duly acknowledged to me that they signed, sealed and delivered the said instrument as their free and voluntary act and deed and as the free and voluntary act and deed of said Iowa Central & Western Railway Company, and that such corporation executed the same for the considerations, duties and purposes therein set forth.

And on said 12th day of May, 1916, the said F. H. Davis and A. C. Doan being by me severally duly sworn, did depose and say, the said F. H. Davis that he is a Vice-President, and the said A. C. Doan that he is the Assistant Secretary of Iowa Central & Western Railway Company, one of the corporations described in and which executed the foregoing instrument; that they resided, the said F. H. Davis, in Elizabeth, N. J., and the said A. C. Doan, in the City of New York, N. Y.; that they knew the corporate seal of said corporation; that the seal affixed to said instrument is the corporate seal of said corporation and that said seal was so affixed and said instrument was signed, sealed and delivered in behalf of said corporation by authority of its Board of Directors and that they respectively signed their names thereto by like authority.

In witness whereof, I have hereunto set my hand and affixed my official seal this 12th day of May, 1916.

E. A. Adams, Notary Public, Kings Co., No. 30. Reg. off., No. 8028. Certificate filed in N. Y. Co., No. 58. Reg. off., No. 8066. (Seal.)

No. 12343, Series B.

STATE OF NEW YORK,
County of New York, ss:

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, that E. A. Adams whose name is subscribed to the deposition or certificate of the proof or acknowl- [fol. 718] edgment of the annexed instrument, and thereon written, was, at the time of taking such deposition or proof and acknowledgment, a Notary Public, acting in and for the said Cou-ty, duly commissioned and sworn, and authorized by the laws of said State to take depositions and also acknowledgments and proofs of deeds, or conveyances for land, tenements or hereditaments in said State of New York. That there is on file in the Clerk's office of the County of New York, a certified copy of his appointment and qualification as Notary Public of the County of Kings with his autograph signature. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature to said deposition, or certificate of proof or acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County this 13 day of May 1916.

Wm. F. Schneider, Clerk. (Seal.)

(10c U. S. I. R. S. cancelled.)

Polk County, Iowa. Filed for Record at 8:30 A. M. Jun. 29, 1916, Book 25, page 329. Chas. A. Guth, Recorder. Chas. A. Guth, Deputy.

STATE OF IOWA, ss:

Filed for record in the office of Secretary of State June 29 A. D. 1916 and Recorded in Book W-5 page 38.

W. S. Allen, Secretary of State.

Proof of publication filed July 29, 1916.

[fol. 719] The Minneapolis and St. Louis Railroad Company,

Certificate of Amendment of Articles of Incorporation

We, the undersigned, C. W. Huntington, Vice-President, and Raymond B. Alberson, Assistant Secretary of The Minneapolis and St. Louis Railroad Company, do hereby certify that on the 27″ day of July, 1916, a special meeting of the stockholders of said company was held at the office of said company in the City of Des Moines, Iowa, for the purpose of authorizing the amendment of the Articles of Incorporation of said company as hereinafter set forth; that said meeting of the stockholders of said company was held pursuant to written waivers of notice of said meeting signed by the holders of

all of the capital stock of the company issued and outstanding; and that the holders of all of the capital of said company issued and outstanding were represented by proxy at said meeting.

And we do hereby further certify that at said meeting following resolutions were duly adopted by the affirmative vote of the holders of all of the capital stock of said company issued and outstanding, viz.:

Resolved, That Article or Paragraph VI of the Articles of Incorporation of this company be amended so as to read as follows:

"VI. The estate and affairs of the Consolidated Company shall be managed by a board of not less than three, nor more than eleven, directors, the number of whom shall be fixed from time ot time by the by-laws, who shall elect from time to time a president, two or more vice presidents, a treasurer, a secretary and such other officers as may be provided for in the by-laws of the Consolidated Company and as may be determined by the said board of directors to be necessary or advisable.

The names and places of residence of the directors and officers of the Consolidated Company for the first year shall be as follows:

Directors	Residence
Newman Erb	New York City, N. Y.
F. H. Davis	Elizabeth, N. J.
Frank P. Frazier	New York City, N. Y.
[fol. 720] A. C. Doan	New York City, N. Y.
Ward E. Pearson	New York City, N. Y.
Wm. J. Wollman	New York City, N. Y.
T. P. Shonts	New York City, N. Y.
H. E. Huntington	Los Angeles, California.
Frank Trumbull	New York City, N. Y.

Officers	Residence
President, Newman Erb	New York City, N. Y.
Vice-President and Treasurer, F. H. Davis	Elizabeth, N. J.
Vice-President and General Manager, C. W. Huntington	Minneapolis, Minn.
Secretary, A. C. Doan	New York City, N. Y.

The terms of office of the said directors shall continue until the first Tuesday in October, 1916. The said officers shall hold office for the same period, but any of said officers may be removed at any time by vote of the board of directors.

After the first year the directors shall be chosen at the annual meeting of the stockholders of the Consolidated Company to be held at the office of the Consolidated Company in the City of Des Moines, State of Iowa, on the first Tuesday of the month of October in each year, and shall hold office for the term of one year and until their successors shall have been elected and shall have qualified. Any vacancy in the board of directors occuring by death, resignation or otherwise may be filled by the vote of a majority of the board.

The by-laws, rules and regulations of the Minneapolis Company are hereby adopted and shall hereafter be the by-laws, rules and regulations of the Consolidated Company until the same shall be modified or changed, repealed or rescinded.

The board of directors of the Consolidated Company shall have full power and control over all the assets and property hereby transferred to the Consolidated Company, and shall exercise all the powers corporate and other of the Consolidated Company as the successor of each of the companies parties hereto, and may make and adopt other by-laws prescribing the duties of the officers of the Company [fol. 721] and regulating the transaction of the Company's affairs, and may by proper action modify the by-laws herein adopted, and said board of directors may and shall have and are hereby invested with all the powers and authority conferred upon, vested in or exercised by the board of directors of either of the parties hereto."

Further resolved, That Mr. Newman Erb, President, or Mr. C. W. Huntington, Vice-President, and Mr. A. E. Smith, Assistant Secretary, or Mr. Raymond B. Alberson, Assistant Secretary of this company, be, and they are hereby authorized and directed to make, sign, verify and acknowledge any and all certificates required to be made and filed, and to do any and all acts and things that may be necessary to carry into effect the foregoing amendment.

And we do hereby further accordingly certify that the Articles of Incorporation of said company have been amended as herein set forth.

In witness whereof, we have made, signed, verified and acknowledged this certificate this 27" day of July 1916.

C. W. Hunt*h*ington, Vice-President. Raymond B. Alberson, Assistant Secretary. (Corporate Seal.)

STATE OF IOWA,
County of Polk, ss:

On this 27th day of July, 1916, before me personally appeared C. W. Huntington and Raymond B. Alberson, to me personally known, who being by me duly sworn did depose and say: That they were the Vice-President and Assistant Secretary respectively of The Minneapolis and St. Louis Railroad Company; that they had read the foregoing certificate by them subscribed and knew the contents thereof; that the seal affixed to the foregoing instrument is the corporate seal of said corporation; and that said certificate was executed [fol. 722] by them in behalf of said corporation and said seal affixed by authority and direction of its stockholders at the meeting referred to in said certificate; and said C. W. Hunting*ton* and Raymond B. Alberson severally duly acknowledged the foregoing certificate by them subscribed to be true to the best of their knowledge and belief.

——, ——.

Subscribed and sworn to before me this 27th day of July, 1916. Wm. M. Wilcoxen, Notary Public in and for Polk County, Iowa. (Seal.)

10988. Polk County, Iowa. Filed for Record at 1:30 P. M. Jul. 27, 1916, Book 25, Page 352.

Chas. A. Guth, Recorder. G. W. Mattern, Deputy.

STATE OF IOWA, ss:

Filed for record in the office of Secretary of State July 27, A. D. 1916, and recorded in book W-5, page 303.

W. S. Allen, Secretary of State.

Proof of publication filed Sept. 1, 1916.

The Minneapolis & St. Louis Railroad Company Certificate of Amendment of Articles of Incorporation

We, the undersigned, W. H. Bremner, President, and R. B. Albertson Assistant Secretary, of the Minneapolis & St. Louis Railroad Company, do hereby certify that on the 2nd day of October, 1917, the annual meeting of the stockholders of said Company was held at the office of said Company in the City of Des Moines, Iowa, and that at said meeting a majority of the holders of the capital stock of the Company issued and outstanding were present or represented by proxy; and we do hereby further certify that at said meeting the following resolution was duly adopted by the unanimous vote of the holders of all of the capital stock of said company so present at said meeting, viz:

[fol. 723] Resolved: That Article VI of the Articles of Incorporation of this Company as amended be further amended by striking out the following language of said amended Article VI, to-wit:

"After the first year, the Directors shall be chosen at the annual meeting of the stockholders of the Consolidated Company to be held at the office of the Company in the City of Des Moines, State of Iowa, on the first Tuesday of the month of October in each year, and shall hold office for the term of one year and until their successors shall have been elected and shall have qualified. Any vacancy in the Board of Directors occurring by death, resignation or otherwise may be filled by the vote of a majority of the Board:"

and by inserting in lieu thereof the following language, to-wit:

"After the year 1917, the annual meeting of the stockholders of the Consolidated Company shall be held at the office of the Consolidated Company in the City of Des Moines, State of Iowa, on the first Tuesday of the month of May in each year. Directors chosen at the annual meeting of the stockholders held in the month of October, 1917, shall hold office until the annual meeting in the month of May, 1918. Directors chosen at the annual meeting in the month of May, 1918, and those chosen at the annual meetings to be held thereafter, shall hold office for the term of one year, or until their successors shall have been elected and shall have qualified. Any vacancy in the Board of Directors occurring by death, resignation or otherwise may be filled by the vote of a majority of the Board."

It was further moved and seconded at said meeting that the President and the Secretary, or an Assistant Secretary, of said Company, be authorized and directed to prepare the necessary papers to be published and filed for record, according to the laws of the State of Iowa, and to do and perform such acts and things as might be necessary to effectuate said change in the Articles of Incorporation of said Company, which said resolution was duly carried by the unanimous vote of all stockholders present at said annual meeting.
[fol. 724] And we hereby certify that the Articles of Incorporation of said Company have been amended as above set forth.

In witness whereof, we hereunto attach our signatures and the seal of the corporation this 2nd day of October, 1917.

W. H. Brenner, President. R. B. Alberson, Assistant Secretary. (Seal.)

STATE OF IOWA,
County of Polk, ss:

On this 2nd day of October, 1917, before me personally appeared W. H. Brenner and R. B. Alberson, to me personally known, who, being by me duly sworn, did state:

That they are the President and Assistant Secretary, respectively of the Minneapolis & St. Louis Railroad Company; that they have read the foregoing certificate by them subscribed and know the contents thereof; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said certificate was executed by them in behalf of said corporation, and that said seal affixed by authority and direction of its stockholders at the meeting referred to in said certificate, and said W. H. Brenner and R. B. Alberson severally duly acknowledged the foregoing certificate by them subscribed, to be true to the best of their knowledge and belief.

Crom. Brown, Notary Public in and for Polk County, Iowa. (Seal.)

POLK COUNTY,
Iowa:

Filed for record at 9:34 A. M. Oct. 3, 1917, Book 26, Page 283
Chas. A. Guth, Recorder. Chas. A. Guth.

[fol. 725] STATE OF IOWA, ss:

Filed for record in the office of Secretary of State October 3, A. D. 1917, and recorded in book C-6, page 206.
W. S. Allen, Secretary of State.

Proof of publication filed Oct. 31, 1917.

Certificate of Amendment of Articles of Incorporation

We, the undersigned, W. H. Bremner, President, and R. B. Alberson, Assistant Secretary, of The Minneapolis and St. Louis Railroad Company, do hereby certify that on the 7th day of May, 1918, the annual meeting of the stockholders of said Company was held at the office of said Company in the City of Des Moines, Iowa, pursuant to the Articles of Incorporation, due notice of said meeting having been published as required by the By-laws of said company; and that the holders of a majority of the capital stock of the Company issued and outstanding were present at said meeting, in person or by proxy.

And we do hereby certify that at said meeting the following resolution was duly adopted by the affirmative vote of the holders of a majority of the capital stock of said Company issued and outstanding viz:

Resolved: That the first paragraph of Article VI of the Articles of Incorporation of this Company as amended be further amended by striking from the third line thereof the word "eleven" and substituting therefor the word "twelve," so that the same as amended shall read:

"VI. The estate and affairs of the Consolidated Company shall be managed by a board of not less than three, nor more than twelve, directors, the number of whom shall be fixed from time to time by the By-Laws, and who shall elect from time to time a president, two or more vice-presidents, a treasurer, a secretary, and such other officers as may be provided for in the By laws of the Consolidated Company, and as may be determined by the said Board of Directors to be necessary or advisable."

[fol. 726] Further resolved that Mr. W. H. Bremner, President, or Mr. A. C. Doan, Secretary, or Mr. R. B. Alberson, Assistant Secretary of this Company, be and they are hereby authorized and directed to make, sign, verify and acknowledge any and all certificates required to be made and filed, or all notices required to be published, and to do any and all acts and things that may be necessary to carry into effect the foregoing amendment.

And we do hereby further accordingly certify that the Articles of Incorporation of the Minneapolis & St. Louis Railroad Company have been amended *by* herein set forth.

In witness whereof, we have made, signed, verified and acknowledged this certificate this 7th day of May, 1918.

W. H. Bremner, President. R. B. Alberson, Assistant Secretary. (Seal.)

State of Iowa,
County of Polk, ss:

On the 7th day of May, 1918, before me personally appeared W. H. Bremner and R. B. Alberson, to me personally known, who being by me duly sworn, did depose and say that they are the President and Assistant Secretary respectively of the Minneapolis & St. Louis Rail-

road Company; That they had read the foregoing certificate by them subscribed and knew the contents thereof; that the seal affixed to the foregoing instrument is the corporate seal of said corporation; and that said certificate was executed by them in behalf of said corporation and said seal affixed by authority and direction of its stockholders at the meeting referred to in said certificate; and said W. H. [fol. 727] Bremner and R. B. Alberson severally duly acknowledged the foregoing certificate by them subscribed to be true, as they verily believe.

—— ——.

Subscribed in my presence and sworn to before me this 7th day of May, A. D. 1918. Mary A. Kean, Notary Public in and for Polk County, Iowa. (Seal.)

POLK COUNTY, IOWA:

Filed for record at 3.04 P. M. May 7, 1918, book 27, page 3.
Chas. A. Guth, Recorder. H. Kern, Deputy.

STATE OF IOWA, ss:

Filed for record in the office of Secretary of State May 7, A. D. 1918, and recorded in book F-6, page 277.
W. S. Allen, Secretary of State.

Proof of publication filed May 30, 1918.

[fol. 728] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT "F"

(Copy)

Peoria & Pekin Union Railway Company

Peoria, July 28th, 1924.

Mr. W. H. Bremner, receiver Minneapolis and St. Louis Railroad Company, Minneapolis, Minn.

DEAR SIR: In connection with payment by your Company for transfer service rendered at Peoria and delivery of traffic to connecting lines by this Company, regarding which I telegraphed you on July 23rd and conferred with you in your office at Minneapolis on July 26th, I am writing to confirm basis of operation and settlement outlined in my telegram and discussed at our conference, and, in the event the arrangement is not acceptable to you, to indicate the policy this Company will pursue after the specified time.

Effective August 1st, 1924, this Company will handle all traffic from your line on the same basis as that which existed prior to De-

cember 15th, 1922, and preceding the last decision of the Interstate Commerce Commission and the issuance by the Commission of its Service Order No. 37; this arrangement being the payment by you for the Receivers, the tariff rate of $4.00 per car for all cars, both loaded and empty, moving eastbound, offered by your line in interchange to this Company to be delivered to connecting lines, settlement to be made at four different periods during the month by junction arrangement. This arrangement to continue in effect until final disposition of the matter is made by the Commission or Court, or both, and the same being without prejudice to either party.

Immediately upon receipt of this letter please advise me whether or not this basis of operation and settlement is acceptable to you as Receiver, and that the terms outlined will be complied with and settlements made accordingly; the first settlement to be made August 8th, 1924. In the event that you do not accept this arrangement and basis of operation, the same to be specified in a letter immediately upon receipt of this communication, on and after the date set for the first payment, August 8th, this Company will receive and handle only such cars in transfer service for which payment of the stipulated charges is made in advance of movement.

In order that no delay may occur please telegraph acknowledgement upon receipt of this letter, stating that a prompt reply will be made. It is our purpose by this letter, not only to reiterate and confirm the stipulations of basis of operation outlined in conference, under which traffic will be handled for your line, but in the event such terms are not accepted by you, to also serve as a notice of the action that will be taken by this Company on and after 12:01 A. M., August 8th, 1924.

Yours very truly, (Signed) V. V. Boatner.

[fol. 729] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT "G"

STATE OF MINNESOTA,
County of Hennepin, ss:

I, W. H. Bremner, being duly sworn, depose and say that I am the Receiver of the Minneapolis & St. Louis Railroad Company, acting under appointment of the District Court of the United States in and for the District of Minnesota, by order dated July 26, 1923. That as such Receiver I am in charge of the operation of the property of The Minneapolis & St. Louis Railroad Company. That the said railroad extends into the State of Illinois and into the City of Peoria, which is the eastern terminus thereof. That as such Receiver, operating the said line of railroad, I am engaged in the transportation of persons and property in interstate commerce. That the tracks of The Minneapolis & St. Louis Railroad Company connect with the tracks of the Peoria & Pekin Union Railway Company at a point in the City of Peoria, Illinois, known as Iowa Junction.

That prior to my appointment as Receiver, I was President of The Minneapolis & St. Louis Railroad Company, and am familiar with the method of operation of the said railroad in Peoria and with the method which has been, and is now being, followed in delivering cars arriving in Peoria over the line of The Minneapolis & St. Louis Railroad Company to the tenants of the Peoria & Pekin Union Railway Company for transportation to points on or beyond their respective lines.

That the method of making such deliveries to the tenants of the Peoria & Pekin Union Railway Company, by delivering cars upon the rails of the said Union Company upon a track designated by it, [fol. 730] is in all respects the same at the present time as was being followed in 1922 at the time when the order of the Interstate Commerce Commission, in its docket No. 13110 in the case entitled "The Minneapolis & St. Louis Railroad Company vs. Peoria & Pekin Union Railway Company", dated April 13, 1922, was entered.

I further depose and say that on or about the — day of July, 1924, I received a letter from V. V. Boatner, the President of the Peoria & Pekin Union Railway Company, copy of which is hereto attached, marked "Exhibit A".

That I am informed and believe that the method of interchange of cars between the Chicago, Rock Island & Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company on the one hand, and the tenants of the Peoria & Pekin Union Railway Company on the other, is in all respects the same as has been followed in effecting such interchange for many years, and that since April 13th, 1922, there has been no change in the physical situation, the method of interchange, or in the imposition of charges against the Rock Island and Burlington Companies which obviates the discrimination resulting from the imposition of a charge upon cars moving into Peoria on the line of the Minneapolis & St. Louis Railroad for delivery to the tenants of the Union Company, and which was by the Commission in its report of April 13, 1922, in the proceeding heretofore referred to, found to exist.

I further depose and say that if the threat contained in Exhibit A, attached hereto, to refuse to receive cars tendered to the Peoria & [fol. 731] Pekin Union Railway Company for shipment beyond Peoria over the lines of its tenants, is carried out, it will be impossible to make delivery of cars to the tenants of the Peoria & Pekin Union Railway Company, as there is no other point at which the line of railroad of the Minneapolis & St. Louis Company connects with the lines of any of the tenants of the Peoria & Pekin Union Railway Company. That in the event of a refusal of the Peoria & Pekin Union Railway Company to receive cars in accord with the threat contained in said Exhibit A, traffic moving over the line of The Minneapolis & St. Louis Railroad Company destined to points on or beyond the lines of the tenants of the Peoria & Pekin Union, will be interrupted. That a congestion will result on the line of The Minneapolis & St. Louis Railroad Company to the great and irreparable damage of affiant as Receiver, and to the shippers and owners of the property involved in such transportation.

(Signed) W. H. Bremner.

Subscribed and sworn to before me this 9 day of August, 1924. (Signed) E. S. Redel. E. S. Redel, Notary Public, Hennepin County, Minn. My commission expires June 18th, 1931. (Notarial Seal.)

[fol. 732] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT "H"

STATE OF ILLINOIS,
County of Cook, ss:

I, F. L. Johnson, depose and say that I am in the employ of the Chicago, Burlington & Quincy Railroad Company as Assistant to the Vice-President in Charge of Operation. That the said company has a line of railroad extending into the City of Peoria, Illinois, where its lines connect with the rails of the Peoria & Pekin Union Railway Company. That I am familiar with the location of the tracks of said companies in the City of Peoria and with the methods followed for many years past in the interchange of cars between the Chicago, Burlington & Quincy Railroad Company and the tenants of the Peoria & Pekin Union Railway Company.

That in the delivery of cars by the Chicago, Burlington & Quincy Railroad Company to the tenants of the Peoria & Pekin Union Railway Company, the said Burlington Company has for many years, and is now, placing the said cars upon tracks of the Peoria & Pekin Union Railway Company designated by it as the place for the receipt of cars to be transported to points on or beyond the respective lines of its tenants. That at no time has the Chicago, Burlington & Quincy Railroad Company paid to the Peoria & Pekin Union Railway Company any sum or sums upon any cars delivered by it to the Peoria & Pekin Union Railway Company for transportation beyond Peoria over the line of one of the tenants of the said Union Company.

That the said Union Company did attempt, by the publication of its tariff known as I. C. C. No. 40, to impose a charge upon cars delivered by the said Burlington Company to the Union Company [fol. 733] for its tenants, which tariff was ordered cancelled by the Interstate Commerce Commission in its order dated December 22, 1922, in a proceeding designated as "Investigation & Suspension Docket No. 1596—Intermediate Switching Charges at Peoria, Illinois." That since the entry of said order there has been no payment by the Chicago, Burlington & Quincy Railroad Company, nor has any agreement been entered into by it to make payment to the Peoria & Pekin Union Railway Company on account of cars delivered to the said Union Company for transportation beyond Peoria over the line of any of the tenants of said Union Company.

That the relative location of the tracks and connections between the tracks of the Burlington Company and the Union Company,

and the method of interchange of cars above referred to, is the same at the present time as at the time of the entry of the order above referred to cancelling the said tariff, I. C. C. No. 40.

(Sgd.) F. L. Johnson.

Subscribed and sworn to before me this 11th day of August, 1924. (Sgd.) Anna Marie Henry, Notary Public. My commission expires June 19th, 1926. (Notarial Seal.)

[fol. 734] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT "I"

STATE OF ILLINOIS,
County of Cook, ss:

I, L. C. Fritch, depose and say that I am in the employ of the Chicago, Rock Island & Pacific Railway Company as Vice-President-Operation. That the said company has a line of railroad extending into the City of Peoria, Illinois, where its lines connect with the rails of the Peoria & Pekin Union Railway Company. That I am familiar with the location of the tracks of said companies in the City of Peoria and with the methods followed for many years past in the interchange of cars between the Chicago, Rock Island & Pacific Railway Company and the tenants of the Peoria & Pekin Union Railway Company.

That in the delivery of cars by the Chicago, Rock Island & Pacific Railway Company to the tenants of the Peoria & Pekin Union Railway Company, the said Rock Island Company has for many years, and is now, placing the said cars upon tracks of the Peoria & Pekin Union Railway Company designated by it as the place for the receipt of cars to be transported to points on or beyond the respective lines of its tenants. That at no time has the Chicago, Rock Island & Pacific Railway Company paid to the Peoria & Pekin Union Railway Company any sum or sums upon any cars delivered by it to the Peoria & Pekin Union Railway Company for transportation beyond Peoria over the line of one of the tenants of the said Union Company.

That the said Union Company did attempt, by the publication of its tariff known as I. C. C. No. 40, to impose a charge upon cars delivered by the said Rock Island Company to the Union Company for its tenants, which tariff was ordered cancelled by the Interstate Com-
[fols. 735-974] merce Commission in its order dated December 22, 1922, in a proceeding designated as "Investigation & Suspension Docket No. 1596—Intermediate Switching Charges at Peoria, Illinois." That since the entry of said order there has been no payment by the Chicago, Rock Island & Pacific Railway Company, nor has any agreement been entered into by it to make payment to the Peoria & Pekin Union Railway Company on account of cars de-

livered to the said Union Company for transportation beyond Peoria over the line of any of the tenants of said Union Company.

That the relative location of the tracks and connections between the tracks of the Rock Island Company and the Union Company, and the method of interchange of cars above referred to, is the same at the present time as at the time of the entry of the order above referred to cancelling the said tariff, I. C. C. No. 40.

(Sgd.) L. C. Fritch.

Subscribed and sworn to before me this 11th day of August, 1924. (Sgd.) B. M. Hopkins, (Seal).

[fol. 975] Clerk's certificate to transcript of record from District Court; omitted in printing.

[fol. 976] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY APPELLANTS OF PARTS OF RECORD TO BE PRINTED, WITH PROOF OF SERVICE—Filed October 22, 1925

To the Clerk of the above court:

Come now the above named appellants, the Minneapolis & St. Louis Railroad Company, and W. H. Bremner, as receiver, and for the purpose of designating the parts of the record necessary to be printed attach hereto the points upon which they will rely upon the submission of the appeal and the parts of the record necessary to be printed for consideration thereof.

M. M. Joyce and Donald Evans, Solicitors for Plaintiffs and Appellants.

[fol. 977] 1. The District Court erred in sustaining the defendant's motion to quash the service of process.

2. The District Court erred in entering the order dissolving the temporary injunction theretofore granted and in dismissing complainants' petition.

3. The District Court erred in holding that the order of the Interstate Commerce Commission entered on April 13, 1922, directing the defendant, Peoria & Pekin Union Railway Company, to remove the discrimination found in the report of said commission of said date to exist, was cancelled and revoked by the entry of the order by the said commission on December 22, 1922, dismissing plaintiff's complaint in the proceeding entitled Minneapolis & St. Louis Railroad Company vs. Peoria & Pekin Union Railway Company, Docket 13110, in which said proceeding the order first above referred to had been entered.

4. The District Court erred in holding that the order entered by the Interstate Commerce Commission on January 8, 1923, reopening the said cause entitled Minneapolis & St. Louis Railroad Company vs. Peoria & Pekin Union Railway Company, Docket 13110, and consolidating the same with the general investigation by said commission ordered on said date, did not have the effect of leaving in force the order of April 13, 1922, directing the removal of the aforesaid discrimination.

5. The District Court erred in failing to hold that the order of the commission entered January 8, 1923, had the effect of leaving the proceeding pending before the commission entitled Minneapolis & St. Louis Railroad Company vs. Peoria & Pekin Union Railway Company, Docket 13110, in the same situation as if the same had never been dismissed.

[fol. 978] And for the purpose of considering the aforesaid points to be relied on, the appellants designate the following portions of the record as necessary and material thereto, and direct that the same be printed and none other:

The petition and supplemental petition filed by the plaintiff, and exhibits thereto attached.

The special entry of appearance of the defendant.

Order for the temporary injunction and bond.

Motion to dissolve injunction.

Answer of defendant.

Stipulation of July 28, 1925.

Plaintiff's exhibits "B," which are the reports and orders of the Interstate Commerce Commission entered April 13, 1922, December 22, 1922, January 8, 1923, respectively, and are the same as exhibits referred to in and attached to plaintiff's petition and supplemental petition.

Plaintiff's exhibit "C," being the answer of the Interstate Commerce Commission filed in the cause entitled Peoria & Pekin Union Railway Company vs. United States, together with exhibits thereto attached.

Plaintiff's Exhibit "D," being a report of the Interstate Commerce Commission filed October 14, 1924.

Plaintiff's exhibit "E," being the articles of incorporation of The Minneapolis & St. Louis Railroad Company.

Plaintiff's exhibits "F," "G," "H," and "I."

Memorandum and order of the court entered August 21, 1925.

Notice of application for stay pending appeal.

Application for stay.

Petition for appeal and assignment of errors.

Order allowing the appeal.

Citation.

Cost bond.

Præcipe for the record.

Statement of the points to be relied on and designation of the record.

[fols. 979 & 980] Service of the within statement of points to be relied on and designation of the record is hereby accepted and receipt of copy acknowledged this 17th day of October, A. D. 1925.

E. E. Horton, R. V. Fletcher, Solicitors for Defendant and Appellee.

[fol. 981] [File endorsement omitted.]

Endorsed on cover: File No. 31490. S. Iowa D. C. U. S. Term No. 767. The Minneapolis & St. Louis Railroad Company and W. H. Bremner, its receiver, appellants, vs. Peoria & Pekin Union Railway Company. Filed October 9th, 1925. File No. 31490.

POSTPONED TO MERITS

JAN 25 1926

Office Supreme Court, U. S.
FILED
JAN 7 1926
WM. R. STANSBURY
CLERK

No. 767

IN THE

Supreme Court of the United States

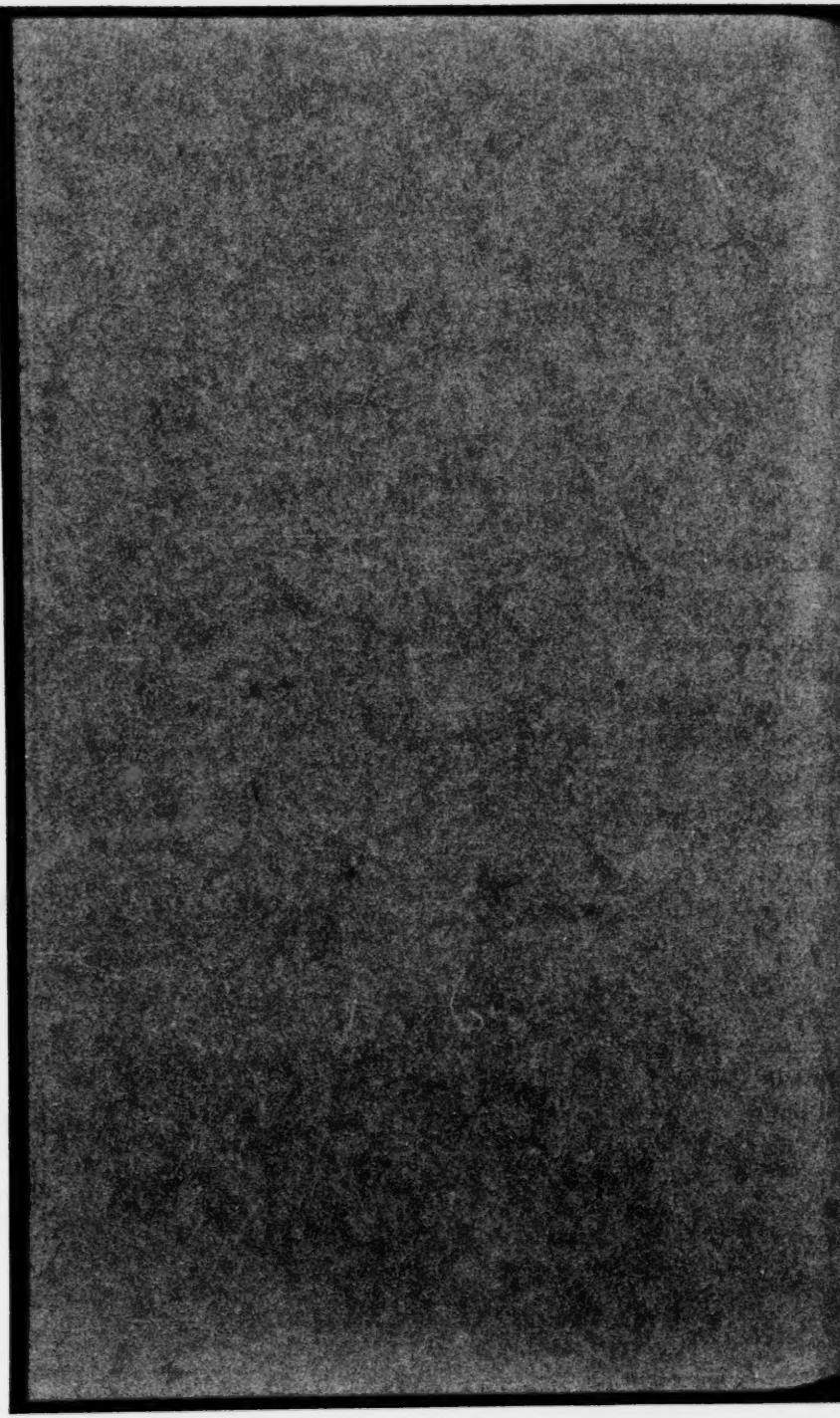
OCTOBER TERM, A. D. 1925.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, ET AL., *Appellants*,
vs.
PEORIA & PEKIN UNION RAILWAY COMPANY, *Appellee*.

Appeal from the District Court of the United States, Southern District of Iowa, Central Division.

MOTION TO REMAND WITH INSTRUCTIONS.

M. M. JOYCE,
DONALD EVANS,
Attorneys for Appellants.



IN THE

Supreme Court of the United States

Minneapolis & St. Louis Railroad Company, et al.,	)	
Appellants,	)	No. 767
vs.	)	MOTION TO
Peoria & Pekin Union Railway Company,	)	REMAND.
Appellee.	)	

Come now the above named appellants and respectfully show to the court that the suit in which this appeal was taken is a suit initiated by the appellants (plaintiffs) against the appellee (the defendant) to enforce an order of the Interstate Commerce Commission under the provisions of the District Court Jurisdiction Act. The order was entered in a proceeding entitled "Minneapolis & St. Louis Railroad Company vs. Peoria & Pekin Union Railway Company", docketed as No. 13110, and directed the defendant to remove, on or before July 13, 1922, the discrimination found by the commission in its report of April 13 to exist.

The discrimination which was found to exist consisted of the imposition of charges against traffic interchanged between The Minneapolis & St. Louis Railroad Company and the tenants of the Peoria & Pekin Union Railway Company without at the same time imposing the same or similar charges upon traffic interchanged between the Chicago, Rock Island & Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company, respectively, and the tenants of the Peoria & Pekin Union Railway Company.

In an attempt to remove the discrimination by the assessment of charges against the traffic of the Chicago, Rock Island

& Pacific Railway Company and the Chicago, Burlington & Quincy Railroad Company, the Peoria & Pekin Union Railway Company published schedules of such charges, the same to become effective on July 13, 1922.

Upon protest of the Rock Island and Burlington companies these schedules were suspended and a hearing had thereon, docket No. 13110 was re-opened for further hearing and consolidated therewith.

On December 22, 1922 the commission filed its report in said consolidated hearing in which it found that the Peoria & Pekin Union Railway Company had failed to justify the charges which it sought to impose against the Rock Island and Burlington companies, respectively, and ordered said schedules cancelled.

The commission indicated in the report that it would on its own motion order a general investigation of the terminal practices at Peoria, in view of which the report stated that no finding would be made in No. 13110 but that the complaint would be dismissed without prejudice to a re-canvass of the entire situation in the general investigation. Accordingly an order was issued dismissing the complaint of The Minneapolis & St. Louis Railroad Company in Docket No. 13110.

On January 8, 1923, the commission entered an order entering upon a general investigation as indicated, re-opening No. 13110 and consolidating it therewith.

In July, 1924, the commission having filed no report or order in the general investigation, the Peoria & Pekin Union Railway Company threatened to interrupt traffic moving from The Minneapolis & St. Louis Railroad Company in interchange to the tenants of the Peoria & Pekin Union Railway Company, and this suit was initiated to enforce the order of April 13, 1922, directing the removal of the discrimination.

The matter came on for hearing on July 28, 1925, and on August 21, 1925, the court entered an order dissolving the temporary injunctions previously issued in the proceeding and setting aside and quashing the service of process.

In a memorandum filed by the court it appeared that such order was entered because there was in existence no order of the Interstate Commerce Commission, and that consequently the defendant, a resident of the Southern District of Illinois, could not be sued in the Southern District of Iowa. It also appears in the memorandum opinion that the court held that the order of April 13, 1922, directing the removal of discrimination was revoked by the order of December 22, 1922 dismissing the complaint of the complainant in Docket No. 13110.

All of the foregoing facts appear in the record lodged in this court on October 9, 1925 (the printing of which has not yet, we believe, been completed).

Thereafter, on November 2, 1922, the above named complainants filed a bill in the United States District Court, in the Southern District of Iowa, against the United States, under the District Court Jurisdiction Act, asking that the order of December 22, 1922 be annulled in so far as it operated to revoke the order of April 13, 1922, which directed that the discrimination be removed. On November 10, 1925 the Interstate Commerce Commission entered the following

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 10th day of November, A. D. 1925.

No. 13110

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY

v.

PEORIA & PEKIN UNION RAILWAY COMPANY

The Commission having under consideration its order of December 22, 1922, dismissing the complaint in the above entitled proceeding, and good cause appearing therefor:

It is ordered, that said order of December 22, 1922, be, and it is hereby, vacated and set aside.

By the Commission:

GEORGE B. McGINTY,
Secretary.

(Seal)

From the opinion filed by the District Court it is apparent that its decision on the question of whether or not the order of April 13, 1922 is in force, would or might have been different if the order entered by the commission on November 10, 1925, had been in existence at the time of the decision of the case. It is also apparent that the question of whether or not the order of April 13, 1922 is in existence is now to be decided upon a state of facts different from those that existed at the time of the decision of the court below.

WHEREFORE, the appellants move the court to remand the cause to the United States District Court, in and for the Southern District of Iowa, without decision at this time, with instructions to allow the appellants (plaintiffs below) to file such supplemental bill as they may deem advisable in the nature of a bill of review or for the purpose of suspending or avoiding the decree upon the new matter arising since the decision of the cause in that court in conformity with the practice adopted by this court in *Ballard vs. Searls*, 130 U. S. 50; 9 Sup. Ct. Rep. 418; or that if such request be denied, that this court treat the showing here made of the matters arising since the decision of the court below as supplemental to the record now on file in this court, and that the cause be decided here upon the record as so supplemented.

Respectfully submitted,

.....

.....

Solicitors for Appellants.

STATE OF IOWA :
: SS
POLK COUNTY :

I, Donald Evans, being first duly sworn, upon oath depose and say that I am one of the solicitors for the appellants in the foregoing cause, that I am familiar with all the statements of fact set forth in the foregoing motion and that they are all true as I verily believe.

.....

Subscribed and sworn to before me this ..... day of ....., 192...

.....
Notary Public in and for Polk County, Iowa.

(8)

FILED

No. 787

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1926

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY and W. H. HEDENBERG, Its Receiver, Appellants,

vs.

PEORIA & PEKIN UNION RAILWAY COMPANY, Appellee.

Appeal from the District Court of the United States for the Southern District of Illinois, Eastern Division.

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO [illegible]

IN THE

Supreme Court of the United States

The Minneapolis & St. Louis Railroad Company and W. H. Bremner, Its Receiver, *Appellants,* vs. Peoria & Pekin Union Railway Company, *Appellee.*	No. 767 Supplemental Showing in Support of Motion to Remand with Instructions.

Come now the above named appellants and respectfully show to the court:

That since the preparation and service of the "Motion to Remand with Instructions" filed in the above entitled cause, a report of an Examiner of the Interstate Commerce Commission before whom evidence was taken relating to "Rates, Regulations and Practices of Peoria & Pekin Union Railway Company at Peoria, Illinois and Nearby Points", designated as General Investigation No. 14534 has been filed in which the said Examiner recommends the cancellation of Peoria & Pekin Union tariff I. C. C. No. 36, and that such recommendation is based upon findings of fact made by said Examiner upon the evidence adduced upon such hearing and other hearings consolidated therewith, including Docket No. 13110 in which the order by this suit sought to be enforced, was originally entered.

It appears from the record now on file in this court that the imposition of charges in accord with said tariff I. C. C. No. 36 against traffic moving into or out of Peoria over the rails of the appellants, constituted the discrimination which was found in the report of the Interstate Commerce Commission of April 13, 1922 to exist and by its order of said date directed to be removed.

Your appellants therefore ask that upon submission of the Motion to Remand with Instructions, heretofore served and filed, the filing of said report containing such recommendations be taken into consideration together with the showing made in said motion heretofore filed.

Respectfully submitted,

.....

.....

Solicitors for Appellants.

STATE OF IOWA)
) SS.
COUNTY OF POLK)

I, Donald Evans, being first duly sworn, upon oath depose and say that I am one of the solicitors for the appellants in the foregoing cause; that I am familiar with all the statements of fact set forth in the foregoing showing in support of motion to remand, and that they are all true as I verily believe.

.....

Subscribed and sworn to before me this ..... day of January, 1926.

.....

FILED
FEB 18 1926
WM. R. STANSBURY
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No. 767

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY AND W. H. BREMNER, Its Receiver, *Appellants*,
vs.
PEORIA & PEKIN UNION RAILWAY COMPANY, *Appellee*.

Appeal from the District Court of the United States, Southern District of Iowa, Central Division.

APPELLANTS' BRIEF AND ARGUMENT.

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INDEX.

	Page
Jurisdiction of the Supreme Court	1
Statement of the Case	2
Errors Relied on	7
Brief of Points and Authorities	7
Argument.	
Effect of Order of December 22, 1922	9
Effect of Order of January 8, 1923	13
Motion to Remand with Leave to File Bill of Review	17

Table of Cases Cited.

Cotton vs. Lyter, 81 Tex. 10-16 S. W. 553	9
18 Corpus Juris, 1174-1214	9, 18
29 Cyc., 1521	9, 14
I. & S., 1596, 77 I. C. C. 43	3, 14
Miller vs. Earl, (Tex.) 15 S. W. 916	9
Minneapolis & St. Louis L. R. Co. vs. Peoria and Pekin U. Ry., 68 I. C. C., 421 Docket No. 13110	2, 14
National Bank vs. McDermand, 187 S. W. 121	9, 16
People vs. Colvin, 165 Ill. 67; 46 N. E. 14	9, 15
Peoria and Pekin Union Ry. vs. United States, 263 U. S. 528	3, 12
Rates, Regulations and Practices of Peoria and Pekin Union Ry. Co. at Peoria and Nearby Points, 93 I. C. C. 3 No. 14534	3
Skinner and Eddy Corp. vs. United States, 249 U. S. 557	8

Table of Statutes.

	Brief	Appendix
Sec. 238, Judicial Code as amended by Act Feb. 13, 1925	1	19
Sec. 207, Judicial Code as amended by Acts June 18, 1910, Mar. 3, 1911 (36 Stat., 539-1148)	1, 7	19
Act Oct. 22, 1913 (38 Stat., 219)	1, 7, 10	19, 20
Act Oct. 22, 1913 (38 Stat., 220)	8, 10	19
Par. (2) Sec. 15, Act Feb. 4, 1887 as amended by Act of June 29, 1906 (34 Stat., 584; 41 Stat., 484)	8, 10	20
Par. (6) Sec. 16, Act Feb. 4, 1887 as amended by Act of June 29, 1906 (34 Stat., 584)	8, 10	20
Par. (12) Sec. 16, Act Feb. 4, 1887 as amended by Acts Mar. 2, 1889; June 29, 1906; June 18, 1910; Feb. 28, 1920 (34 Stat., 584; 36 Stat., 539; 41 Stat., 492)	7	20
Sec. 16a Act Feb. 4, 1887 as amended by Act June 29, 1906 (34 Stat., 592)	8, 11	20

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The memorandum opinion of the Court below has not been reported in any publication, but is to be found commencing on page 50 of the printed record.

JURISDICTION OF THE SUPREME COURT.

This is an appeal from a judgment of the District Court of the United States for the Southern District of Iowa filed August 21, 1925 (R. 49-50) setting aside the service of process and dismissing the petition of the plaintiffs.

The action is one to enforce an order of the Interstate Commerce Commission under the provisions of Section 207 of the Judicial Code and the Acts of June 18, 1910 and March 3, 1911, and the Urgent Deficiencies Appropriations Act of October 22, 1913 (38 Stat. 219).

A direct review by the Supreme Court in such cases is granted by said acts and preserved by Section 238 of the judicial Code as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

On August 6, 1924, the plaintiff herein filed a petition in the District Court for the Southern District of Iowa alleging that on April 13, 1922 the Interstate Commerce Commission in a proceeding pending before it entitled "Minneapolis & St. Louis Railroad Company vs. Peoria & Pekin Union Railway Company," Docket 13110, filed its report containing a finding of fact that the Peoria & Pekin Union Railway Company in attempting to collect charges from the Minneapolis & St. Louis Railroad Company in accordance with its tariff known as I. C. C. No. 36, was practicing an unjust discrimination, and undue prejudice against the Minneapolis & St. Louis Railroad Company, and on that date entered and served an order directing the said Union Company to desist therefrom. The order directed that the discrimination found to exist be removed on or before July 13, 1922, and by its terms was to continue in force until the further order of the Commission. The report of the Commission is to be found commencing on page 6 of the record, the order entered pursuant thereto on page 12 and reported in the official reports of the Interstate Commerce Commission in volume 68, page 412.

The discrimination which the Commission found existed and found to be unlawful resulted from the attempt of the Union Company to assess charges in accordance with said tariff against the traffic interchanged between the plaintiff therein and the tenant companies of the Union, while at the same time it made no charges against traffic interchanged between its tenants and the Burlington and Rock Island Companies, respectively, which the Commission found in said report were, with respect to such traffic, in a situation similar to that of the plaintiff in that proceeding.

In an attempt to comply with said order by imposing a similar charge against the Burlington and Rock Island Companies, the Union Company filed a tariff to become effective on July 1, 1922, providing for the assessment of charges on such traffic against those companies, which tariff was known as I. C. C. No. 40. Upon the protest of the Burlington and Rock Island Companies tariff No. 40 was suspended and a hearing thereon docketed as I. & S. No. 1596. In the meantime the St. Louis Company had filed a petition for further argument (upon questions not relating to discrimination) which, upon the supension of tariff No. 40, was granted and the case opened for further hearing and consolidated with I. & S. 1596.

On December 22, 1922, the Commission filed its report in the consolidated proceeding (R. 13), which is reported in the official reports of the Interstate Commerce Commission in volume 77, page 43.

In this report the Commission found that the Union Company had failed to justify the charges proposed against the Burlington and Rock Island traffic and entered an order (R. 21) directing their cancellation and thus preventing a compliance with the order to remove the discriminiation by the imposition of a charge against the companies favored.

It also appears in the report that the Commission came to the conclusion that it was necessary to instigate an investigation making all Peoria carriers parties, and said:

> "In view of the investigation to be undertaken we shall here make no finding in No. 13110, and shall issue a formal order of dismissal in that case, without prejudice to recanvassing the situation there involved in the course of the investigation aforesaid." (R. pp. 19-20)

And on the same day entered an order (R. p. 21) providing "that the complaint in this proceeding be and it is hereby dismissed."

Thereafter, on the 8th day of January, 1923 (R. 47) the Commission entered the order for the general investigation contemplated by the report of December 22nd, which included the following:

> "It is further ordered, that Docket No. 13110 and Investigation and Suspension Dockets No. 1596 and 1455, be, and they are hereby, reopened, consolidated with and made a part of this investigation." (R. 48)

Prior to the issue of the order of January 8, 1923, however, and in view of the threatened interruption of service through the Peoria gateway which resulted in the entry by the Commission of Service Order No. 37, (before this court in Peoria & Pekin Union Railway Company vs. the United States, 263 U. S. 528), the Commission, acting through Mr. Commissioner Aitchison, chairman of division 5, sent to the President of the defendant a telegram which contained the following:

> "Order against Peoria and Pekin Union Railway Company still stands unrescinded with finding that its tariff

on traffic interchanged with Minneapolis & St. Louis Railway is unduly prejudicial so long as Burlington and Rock Island are preferentially treated." (R. 67)

Pursuant to the order for the general investigation, testimony was taken and the matter submitted to the Commission June 23, 1923, and a report filed by it on October 14, 1924, which is shown commencing on page 68 of the record and reported in the official reports of the Commission in Volume 93, page 3.

In this report the finding of discrimination is reiterated, as appears from the following extract:

> "The record does not lack indicia of unjust discriminations and undue prejudices in the present Peoria situation. We have already found in *Minneapolis & St. Louis R. R. Co. vs. P. & P. U. Ry. Co., supra,* that assessing a charge for the interchange service between East Peoria and the rails of the M. & St. L. and of the Terminal, while contemporaneously performing a similar interchange service from the rails of the Rock Island and Burlington, respectively, without charge, would be unjustly discriminatory and unduly prejudicial and we find no occasion to disturb that finding. No valid distinction can be drawn between the Burlington and the Rock Island on the one hand, and the M. & St. L. on the other, with regard to this interchange service." (R. top of page 83)

And also:

> "We further find that the charges proposed from the rails of the Terminal and the practice of the Union in assessing charges for the interchange service between connections with its tenants and the rails of the M. & St. L. and the Traction, while contemporaneously performing a like service between connections with its tenants and the rails of the Burlington and the Rock Island without charge, are unjustly discriminatory and unduly prejudicial against the M. & St. L., the Terminal, and the Traction, * * *." (R. 85, fol. 701)

In connection with this report no order was entered, but it was stated therein that the record would be held open sixty days for the purpose of allowing the carriers to make an at-

tempt to adjust the controversy in accordance with the ideas expressed in the report.

Between the time of the submission of the general investigation to the Commission on June 23, 1923, and the filing of its report on October 14, 1924, the defendant in July, 1924, served notice on the plaintiffs herein that it would discontinue interchanging traffic between its tenants and the St. Louis Railway, (at that time in the hands of a Receiver), unless charges were paid in accordance with the terms of the tariff I. C. C. No. 36, which had been condemned in the report of the Commission of April 13, 1922 as unjustly discriminatory.

Thereupon this action was brought in the Southern District of Iowa, which is the residence of The Minneapolis & St. Louis Railroad Company (an Iowa corporation with its principal place of business in Des Moines) (R. 87), against the defendant, a citizen and resident of the Southern District of Illinois, asking that the court by appropriate order enforce obedience to the order of the Interstate Commerce Commission of April 13, 1922, directing the removal of the discrimination found in the report of that date to exist, because at that time no similar charge was being paid by or collected from the Burlington or the Rock Island Companies.

A temporary restraining order was issued and upon the day set for hearing upon the application for a temporary injunction the defendant appeared specially and filed a motion to quash the service or process, upon the ground that there was no order of the Interstate Commerce Commission in effect and that, being a resident of the Southern District of Illinois, without agency in the district in which the suit was brought, the court could not acquire jurisdiction over it.

The matter was held in abeyance and temporary injunction continued in effect without decision of the court of the question of jurisdiction until the matter came on for hearing on July 28, 1925, at which time the court entered the judgment from which this appeal is taken, sustaining the motion to set aside and quash the service of process, dismissing the petition, and dissolving the temporary injunction.

From the memorandum filed by the Court, shown commencing on page 50 of the Record, fol. 102, it appears (page 51) that his conclusion that there was no order of the Commission to be enforced is based upon the effect which he gives to the order of December 22, 1922, dismissing the complaint in Docket 13110. The Court was of the opinion that the said order of dismissal operated to revoke or rescind the order

previously entered in the proceeding, and that the order of January 8, 1923, reopening the case, did not have the effect of reviving the order to remove the discrimination.

The citation and order allowing appeal herein were signed on September 12, 1925, and the record lodged in this court on October 9, 1925.

Thereafter on November 2, 1925 these plaintiffs and appellants filed a bill in the District Court for the Southern District of Iowa under the provisions of the Urgent Deficiencies Appropriations Act of October 22, 1913, to annul the order of December 22, 1922 (the order dismissing the complaint in docket 13110) insofar as it operated to revoke or rescind the order of April 13, 1922, directing the defendant to remove the discrimination which the Commission found existed as a result of the charges proposed in tariff I. C. C. No. 36.

Thereafter on November 10, 1925, the Commission on its own motion entered the following order:

"No. 13110
Minneapolis & St. Louis Railroad Company
vs.
Peoria & Pekin Union Railway Company

The Commission having under consideration its order of December 22, 1922, dismissing the complaint in the above entitled proceeding, and good cause appearing therefor:

It is ordered, that said order of December 22, 1922, be, and it is hereby, vacated and set aside.

By the Commission:

GEORGE B. MCGINTY, *Secretary.*"

In the meantime the Commission had ordered further hearing in the general investigation No. 14534 which had been had prior to the decision of this case in the court below, but thereafter and on December 22, 1925, the Examiner before whom such hearing was had, filed his tentative report in which the finding of discrimination is again reiterated and in which there is included a recommendation to the Commission that tariff I. C. C. No. 36 be cancelled; and also that no charge whatever ought to be assessed against the traffic of the St. Louis, Burlington or Rock Island Companies on account of interchange between them respectively and the tenants of the Union Company.

These events which occurred since the decision of this case in the court below have been presented to this court in a motion to remand with leave to file bill of review, the consideration of which has by order of this court been postponed to the hearing on the merits of the appeal.

ERRORS RELIED ON.

First. The court erred in quashing and setting aside the service of process and dissolving the temporary injunction heretofore granted in said cause and dismissing the plaintiff's petition.

Second. The court erred in holding that it was without jurisdiction.

Third. The court erred in holding that the order of the Interstate Commerce Commission dated April 13, 1922, directing the defendant to remove the discrimination found in the report of the Interstate Commerce Commission to exist, was nullified and abrogated by the entry of the order of the Interstate Commerce Commission on December 22, 1922.

Fourth. The court erred in refusing to hold that the order of January 8, 1923, had the effect of leaving Interstate Commerce Commission Docket No. 13110 in the same situation as if the order to dismiss the complaint had never been entered.

BRIEF.

I.

Jurisdiction of cases for the enforcement of orders of the Interstate Commerce Commission of the kind here involved is vested in the district courts.

Judicial Code, Sec. 207;

Acts of June 18, 1920 and March 3, 1911 (36 Stat. 539-1148);

Par. 12, Sec. 16 of the Act of February 4, 1887 as amended by the Acts of March 2, 1889, June 29, 1906, June 18, 1910, February 28, 1920 (34 Stat. 584, 36 Stat. 539, 41 Stat. 492);

Urgent Deficiencies Appropriations Act of October 22, 1913 (38 Stat. 219).

II.

The order sought to be enforced was made upon the petition of The Minneapolis & St. Louis Railroad Company, a citizen and resident of the Southern District of Iowa. That district, therefore, was the proper venue notwithstanding the fact that the defendant was a resident of Illinois, who had no agency in Iowa.

Urgent Deficiencies Appropriations Act of October 22, 1913 (38 Stat. 220);

Skinner & Eddy Corp. v. United States, 249 U. S., 557, at 563.

III.

Hence, the jurisdiction of the court below depended only upon the question of whether there was an order of the Interstate Commerce Commission in force and effect.

IV.

The order of April 13, 1922 was by its terms and by mandate of statute to continue in force until the further order of the Commission.

Par. 2, Sec. 15 of the Act of February 4, 1887 as amended by the Acts of June 29, 1906 and February 28, 1920 (34 Stat. 584; 41 Stat. 484).

V.

The defendant was not relieved by the filing of an application for reargument, of the obligation to comply with the order to remove the discrimination, in the absence of special order by the Commission.

Sec. 16a, Act of February 4, 1887 as amended by the Act of June 29, 1906 (34 Stat. 592).

VI.

In view of the authorization of paragraph 6 of Section 16 of Act of February 4, 1887, as amended by the Act of June 29, 1906 (34 Stat. 584), of the Commission "to suspend or modify its orders upon such notice and in such manner as it shall deem proper," the intention of the Commission is important

in considering the effect of its order of December 22, 1922, dismissing the complaint in Docket 13110.

VII.

That the Commission did not intend by its order of December 22, 1922 (R. 21) to revoke the order directing the removal of the discrimination (R. 12), is manifest from, first, the answer of the Commission filed in the case of *Peoria & Pekin Union Railway Company vs. United States* (R. 61), and the telegram of Mr. Commissioner Aitchison attached thereto as an exhibit (R. 67) which contains a statement that the order to remove the discrimination stands unrescinded; and second, from the report of the Commission filed on October 14, 1924 (R. 68 at pages 83 and 85) in which the finding of unjust and undue discrimination is reiterated.

VIII.

If, however, the order to remove the discrimination was rescinded or revoked by the order of December 22, 1922 dismissing the complaint, such order was set aside and vacated by the order of January 8, 1923 (R. 47-48) reopening Docket 13110 and consolidating it with the general investigation thereby ordered. It thus left Docket 13110 in precisely the same situation in which it would have been if never dismissed.

National Bank v. McDermand, 187 S. W., 121 (Mo.);
People v. Colvin, 165 Ill. 67, 46 N. E., 14;
Miller v. Earl, 15 S. W., 916 (Tex.);
Cotton v. Lyter, 81 Tex. 10, 16 S. W., 553;
18 Corpus Juris, 1174 and 1214;
29 Cyc., 1521.

ARGUMENT.

EFFECT OF ORDER OF DECEMBER 22, 1922, DISMISSING COMPLAINT IN DOCKET 13110.

As heretofore stated, the only question presented upon this appeal is whether or not the order entered by the Interstate Commerce Commission on April 13, 1922 was in effect at the time of the institution of this proceeding. If the order was in effect, the District Court of the Southern District of Iowa had jurisdiction of the defendant under the Act of October 22,

1913, (see Chapter 32, Revised Statutes, 38 Stat. 219 and 220) providing:

> "The venue of any suit hereafter brought to *enforce*, suspend or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order is made. * * *
>
> The orders, writs and processes of the district courts may in these cases run, be served and be returnable anywhere in the United States. * * *" (Italics ours.)

The fact that an order was entered on April 13, 1922, directing the defendant herein to remove the discrimination, which the Commission found in its report of said date was unlawful, is not subject to dispute. As indicated in the memorandum of the District Court, this question is to be determined by consideration of the effect of its order of December 22, 1922, dismissing the complaint filed in the proceeding in which the order here sought to be enmforced was entered, and the effect of the order of January 8, 1923, reopening the case and consolidating it with the general investigation which the Commission initiated.

In considering this question, it is important to note the following other provision of the Act to Regulate Commerce.

Par. 2 of Section 15 provides:

> "Except as otherwise provided in this Act, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time not less than thirty days, and shall continue in force until its further order, or for a specific period of time as shall be described in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

There was no further order of the Commission which in terms undertook to suspend, set aside or modify the order to remove the discrimination upon which this suit is based.

Par. 6 of Section 16 of the same Act provides:

> "The Commission shall be authorized to suspend or modify its orders upon such notice and *in such manner as it* shall deem proper." (Italics ours.)

And it is provided in Section 16a of the same Act, as amended by the Act of June 29, 1906, see 3591, 44 Stat. 592, that any party to any proceeding before the Commission

> "may at any time make application for rehearing of the same or matter determined therein and it shall be lawful for the Commission in its discretion to grant such a rehearing, if sufficient reason therefor be made to appear. * * * No such application shall excuse any carrier from complying with any requirement of the Commission or operate in any manner to stay or postpone the enforcement thereof without the *special order* of the Commission. * * *" (Italics ours.)

As stated above, the Interstate Commerce Commission entered no order which in terms suspended or modified the order to remove the discrimination, and the order, therefore, is still in full force and effect, unless the effect of the order of December 22, 1922, dismissing the complaint, is, regardless of the intention of the Commission, to be given that effect.

We have set forth the foregoing statutory provisions because they show: first, that it is the purpose of the Act to require obedience to the order of the Commission, notwithstanding the pending of petitions for rehearing; and second, that in view of the provision authorizing the Commission to suspend, set aside or modify its order in such manner as it shall deem proper, together with the provision that its orders are to remain in force until its further order the question of the intention of the Commission is necessarily to be considered in determining the effect of the order of dismissal upon the order previously entered.

It would seem that if the Commission is authorized to set aside its order in such manner as it shall deem proper that the converse must be true, that is to say, that no order entered by the Commission shall be deemed to have been set aside by any subsequent order, unless the intention of the Commission to give the subsequent order such effect is clearly manifest.

That the Commission did not intend to revoke its order of April 13, 1922 by its subsequent order of dismissal of the complaint is, it seems to us, clear. In the report of April 13, 1922, there had been a specific finding of fact that the tariff under attack in that proceeding was unjustly prejudicial and unlawfully discriminatory. In the report of December 22,

1922, in connection with which the order dismissing the complaint was entered, the following appears: (Bottom page 19 of Record)

> "In view of the investigation to be undertaken we shall here make no finding in No. 13110, and shall issue a formal order of dismissal in that case, without prejudice to recanvassing the situation there involved in the course of the investigation aforesaid."

And while it is true that Mr. Commissioner Esch, in a dissenting opinion, calls attention to the fact that the decision of the Commission "continues the unjust discrimination and undue prejudice against the complainant found to exist in the original report," it is inconceivable that the Commission, without any modification of its finding of fact, intended to revoke the order based upon it.

Also, it is obvious, that the Commission by the entry of its order of dismissal did not intend to revoke its order directing the removal of the discrimination, from the telegram sent by Mr. Commissioner Aitchison, as Chairman of Division 5, to the President of the Peoria & Pekin Union Railway Company, which appears on page 67 of the Record (fol. 678), wherein it is said:

> "Order against Peoria and Pekin Union Railway still stands unrescinded with finding that its tariff on traffic interchanged with Minneapolis and St. Louis Railway is unduly prejudicial so long as Burlington and Rock Island are preferentially treated.

This telegram was sent on January 5, 1923, in view of the threat which was being made by the defendant to interrupt service and refuse to permit interchange to be made between the complainant and its tenants, unless charges were paid in accordance with the tariff under attack in the proceeding docketed as 13110.

This telegram was attached as an Exhibit to the answer filed by the Interstate Commerce Commission in a proceeding instituted by the Union Company to annul service order #37, which was annulled by order of this court, the case being reported underm the title of *"Peoria & Pekin Union Railway Company vs. United States,"* 263 U. S., 528.

The matters involved in that decision are not relevant here, but the answer filed by the Commission in that proceeding, together with this telegram attached thereto as an Exhibit, was introduced into this record for the purpose of showing the position that the Commission had taken, and the attitude that it had assumed with respect to the effect of its order of dismissal.

The intention of the Commission in this respect is also manifest from the report which it filed on October 14, 1924 in the general investigation referred to in #14534, in which the finding of unjust discrimination and undue prejudice is reiterated as indicated in the excerpts from said report, which we have quoted in the statement of the case. (*Ante*, page 4.)

Therefore, we earnestly contend that in view of the statutory provision providing that a special order of the Commission is necessary to relieve the carrier from the obligation of complying with an order duly entered and served in the event of the filing of an application for rehearing; and in view of the provision that the orders of the commission are to remain in effect until further order, and in view of the further provision that the manner of suspending or setting aside an order of the Commission is by statute left solely for its determination, that the intention of the Commission is of controlling importance. It seems to us that it must also follow from the provision of the statute which provides that orders of the Commission shall remain in force until the further order of the Commission means until further order with respect to the subject matter of any order in question, and that the phrase "Special Order of the Commission," which is required in the event of the filing of an application for rehearing, in order to relieve a carrier from the obligation of obeying an order previously entered, means a special order with reference to the same subject matter.

We, therefore, submit that the District Court erred in holding that the order directing the removal of discrimination entered on April 13, 1922, to enforce which this suit was brought, was revoked or set aside by the order of Dec. 22, 1922, dismissing the complaint.

EFFECT OF THE ORDER OF JANUARY 8, 1923, REOPENING DOCKET 13110.

However, if the contention above made cannot be sustained, it is our contention that the order of January 8, 1923,

reopening the case and consolidating it with the general investigation initiated by the order of the Commission, had the effect of setting aside or vacating the order of dismissal and left the proceeding in precisely the same situation that would have existed if the order of dismissal had never been entered.

The order in question, in so far as it is relevant to the question here considered, provided (Record page 48):

> "It is further ordered that Docket 13110 and Investigation and Suspension Dockets No. 1596 and 1455, be, and they are hereby, reopened, consolidated with and made a part of this investigation."

It is obvious that after the entry of this order, Docket 13110 no longer stood as a dismissed proceeding.

The point of difference between the parties seems to be whether the effect of such order left the proceeding in the same situation as it was at the time of its inception, or the same as that which existed immediately prior to the entry of the order of dismissal.

Authorities involving situations analogous are few, but decisions of Courts of last resort, involving the effect of dismissal and reinstatement of actions, use language indicating that the effect of a reinstatement of a case in courts which had been previously dismissed was to leave it in precisely the same situation as it was prior to its dismissal.

For instance, in 18 Corpus Juris, page 1174, Section 72, it is said:

> "Where a nonsuit is set aside plaintiff is restored to all his rights and the cause is reinstated for trial."

And it has been uniformly held that where a suit is not barred by the statute of limitations when brought, it is not affected by a nonsuit or dismissal and reinstatement. This must necessarily be on the theory that after reinstatement the cause is in the same situation in which it would have been if it had never been dismissed. The authorities cited in the Brief, with the exception of those hereinafter to be specifically referred to, deal with the effect upon the defense of the statute of limitations of a dismissal of nonsuit and reinstatement.

It is also said in 29 Cyc., page 1251:

"An order vacating a former order may itself be vacated * * * in which case the original order is reinstated."

Therefore, even if it be true that the order of April 13, 1922 was vacated or set aside by the order of December 22, 1922, dismissing the complaint, the order of January 8, 1923, had the effect of vacating the order of dismissal, and under the authority of the above text was effective to reinstate the original order.

This text is sustained by a decision of the Supreme Court of Illinois in *People v. Colvin*, 116 Illinois, page 67, 46 N. E., 14, which involved an appeal from a judgment refusing an application by the County Tax Collector of Cook County for an order of sale of property belonging to the appellee, returned as delinquent, for an installment of a special assessment levied by the city of Chicago. The point was made that the special assessment had not been confirmed, as required by law. The Court said:

"It is not denied that there was a judgment of confirmation entered on February 19, 1892, but it appears from the record that, on the 25th of April following, a motion of the attorney for the city of Chicago, that all orders heretofore entered in said cause be vacated and the petition dismissed, was allowed; also, that on the 30th of the same month, on motion of the same attorney, it was ordered 'that the order entered herein dismissing the petition, and vacating the orders heretofore entered in said cause, be, and the same are hereby, vacated, and the said cause is hereby reinstated.' The contention on the part of the objector is that the order of April 25th vacated the judgment of confirmation, and that the subsequent order setting aside the vacation, and reinstating the cause, did not revive the judgment of February 19th."

And after dealing with the question of the jurisdiction of the court to enter the aforesaid orders, the Supreme Court proceeded to say:

"When the first order was set aside, and the case reinstated upon the docket, *it was there just as it would have been if the order of April 25th had never been made.* There was, in our opinion, an order or judgment of con-

> firmation of the assessment by the County court." (Italics ours.)

In the case of *National Bank v. McDermand*, Kansas City Court of Appeals, 187 S. W., 121, decided June 12, 1916, (but not officially published), there was involved the foreclosure of a materialman's lien, which, under the statutes of Missouri, was lost by a lapse of ninety days from the date of the filing of the lien. The suit was brought within the time required. After some pleading, a motion to dismiss the suit was sustained, but the cause was by subsequent order reinstated. The point was made that it could not be maintained after dismissal, for the reason that the plaintiff had by lapse of time lost his right to a lien. The claim was denied, the Court saying:

> "Since the original suit was brought within 90 days, and the dismissal of the case was in effect set aside and the case reinstated at the same term as that at which the dismissal order was made * * *, the case, upon the refiling of the amended petition, was still in court and *was pending there at all times from the date of the institution thereof.*" (Italics ours.).

It will be seen from the foregoing that the *Colvin* case expressly holds that the order vacating the judgment was itself subject to vacation and that upon being vacated revived the judgment. The analogy between it and the case at bar is striking and very persuasive. It is identical in principle with the situation here presented, if the order of January 8, 1923, reopening the case be treated as an order vacating the order of dismissal.

In his memorandum the Court said: (Record page 54)

> "The reopening of the case merely had the effect of putting it back upon the docket for further consideration."

In the *McDermand* case, however, the words "set aside" or "vacated" were not used. There was merely an order reinstating a case which had been dismissed. The Court held, however, that the effect of the reinstatement was to set aside the order of dismissal. Hence, if that was the effect of the order reopening the case, it must logically follow that it must be treated as one which had never been dismissed, and that being so the order of April 13, 1922, to remove the discrimination had in law never been revoked.

We earnestly contend, therefore, that the court erred, first, in holding that the order of the Commission of December 22, 1922, dismissing the complaint in Docket 13110, had the effect of suspending or revoking the order of April 13, 1922, directing the removal of the undue prejudice and unjust discrimination which the Commission found in its report to exist; and, second, if the first contention is not sound, that the Court erred in holding that the order of January 8, 1923, reopening Docket 13110, did not operate to set aside the order of dismissal and thus revive the order of April 13, 1922, directing the removal of the discrimination.

Therefore, this cause should be remanded to the District Court, with instructions to assume jurisdiction, and grant to the plaintiffs such relief as the order of the Interstate Commerce Commission to enforce which this suit is brought, may entitle them.

MOTION TO REMAND WITH LEAVE TO FILE BILL OF REVIEW.

In view of the opinion expressed by the Court below, that the order of December 22, 1922, dismissing the complaint had the effect of revoking the order to enforce which this suit was brought, and that the order of January 8, 1923, was not effective to vacate or set aside the order of dismissal, these plaintiffs filed a petition in the District Court of the Southern District of Iowa under the provisions of the Act of October 22, 1913, to annul the order of December 22, 1922, in so far as it operated to revoke the order of April 13, 1922.

After the service of the said Bill, the Commission, on its motion, entered an order on November 10, 1925, the text of which is set forth in the motion to remand, which was called to the attention of the Court on January 18, 1923, and also in the statement of the case in this Brief. (*Ante*, page 6...)

This order purports, in terms, to vacate and set aside the order of December 22, 1922. So it appears that if the Court below is right in his opinion as to the effect of the order reopening the case entered January 8, 1923, it can now be made to appear that the order dismissing the complaint has been vacated and set aside by the Commission.

And while it is our contention that the Court was in error in holding that the order of April 13, 1922, was nullified by the order of dismissal and in refusing to hold that the order of dismissal was nullified by the order of January 8, it is clear

that the application of the principle of the authorities cited in the Brief would, since the entry of the order of November 10, 1925, have resulted in a different decision by the court below, if the order of November 10, 1925, had been in existence at the time of the decision.

We, therefore, urge that in the event the appellants are not entitled to a reversal of the judgment of the court below upon the record as made, that the case be remanded, with leave to file a bill of review, or other appropriate pleading, for the purpose of proving the events which have transpired since the decision of the court below and securing a decision thereon.

Respectfully submitted,

M. M. JOYCE,

DONALD EVANS,

Solicitors for Appellants.

APPENDIX.

The pertinent parts of the Statutes cited are as follows:

Section 238 of the Judicial Code as amended by the Act of Feb. 13, 1925.

Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

(4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

Act of Oct. 22, 1913 (38 Stat. 220).

"A final judgment or decree of the Commerce Court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of said final judgment or decree."

Section 207 of the Judicial Code as amended by the Acts of June 18, 1910 (36 Stat., 539), and March 3, 1911, (Chapter 231, 36 Stat. 1148).

"Jurisdiction of the Commerce Court. The Commerce Court shall have the jurisdiction possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds:

(1) All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money."

Act of Oct. 22, 1913 (38 Stat. 219).

"The Commerce Court * * * is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said

Act is transferred to and vested in the several district Courts of the United States * * *."

Urgent Deficiencies Appropriations Act of Oct. 22, 1913 (38 Stat. 219).

"The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, * * *."

Par. 12, Sec. 16 of the Act of Feb. 4, 1887, as amended by the Acts of March 2, 1889, June 29, 1906, June 18, 1910, Feb. 28, 1920 (34 Stat. 584, 36 Stat. 539, 41 Stat. 492).

"If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States by its Attorney General, may apply to the Commerce Court for the enforcement of such order. * * *."

Par. 2, Sec. 15 of the Act of Feb. 4, 1887 as amended by the Acts of June 29, 1906 and Feb. 28, 1920 (34 Stat. 584; 41 Stat. 484).

"Except as otherwise provided in this Act, all orders of the Commission, other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction."

Par. 6, Sec. 16 of the Act of Feb. 4, 1887 as amended by the Act of June 29, 1906 (34 Stat. 584).

"The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

Sec. 16a, Act of Feb. 4, 1887 as amended by the Act of June 29, 1906 (34 Stat. 592).

"That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto

may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, *without the special order of the Commission.* * * *" (Italics ours.)

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No. 767

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, et al.,
Appellants,

vs.

PEORIA & PEKIN UNION RAILWAY COMPANY,
Appellee.

Appeal from the District Court of the United States, Southern District of Iowa, Central Division.

APPELLEE'S REPLY TO APPELLANTS' MOTION TO REMAND.

ROBERT V. FLETCHER,
ATTORNEY FOR APPELLEE.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1925.

THE MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, et al., *Appellants,* vs. PEORIA & PEKIN UNION RAILWAY COMPANY, *Appellee.*	Appeal from the District Court of the United States, Southern District of Iowa, Central Division.

APPELLEE'S REPLY TO APPELLANTS' MOTION TO REMAND.

Appellants in this cause have filed a motion to remand the case to the United States District Court for the Southern District of Iowa without consideration of the merits, so that Appellants may file such supplemental bill as to them may seem advisable. The motion is based upon an order of the Interstate Commerce Commission entered on November 10, 1925, subsequent to the rendition of the final decree in this case dismissing the bill, and subsequent to the removal of the cause to this Court by appeal. The motion is based upon the ruling of this Court in

Ballard v. *Searls*, 130 U. S. 50.

On December 14, 1925, the Court, upon Appellee's motion, entered an order advancing this case, placing the same on the summary docket, and assigning it for argument on Monday, March 15, 1926. Appellee files this memorandum in opposition to the motion to remand.

The record in this case shows that the original bill was filed about August 1, 1924. The purpose of the bill was to enjoin Defendant (Appellee here) from refusing to switch cars for Plaintiffs, (Appellants here) it being alleged that Defendant, Peoria & Pekin Union Railway Company, was obligated to perform this service by reason of a certain order of the Interstate Commerce Commission bearing date of April 13, 1922. One phase of the matter has heretofore been considered by this court. Compare

Peoria & Pekin Union Ry. Co. v. *United States,* 263 U. S. 528.

Peoria & Pekin Union Railway Company is a citizen of the State of Illinois, and in ordinary actions cannot be sued, over its objection, elsewhere than in the Southern District of Illinois, of which it is an inhabitant. (See Section 51 of the Judicial Code). The record shows that the Defendant made timely special appearance in the District Court for the Southern District of Iowa, and entered objection to the jurisdiction and filed a motion to quash the service of summons on the ground that it could be sued only in the District whereof it was an inhabitant. It was contended by the Plaintiffs that the suit was one to enforce an order of the Interstate Commerce Commission, namely, the order of April 13, 1922, which order prohibited Peoria & Pekin Union Railway Company from discriminating against the Minneapolis & St. Louis Railroad Company by making a charge for services against the Minneapolis & St. Louis Company without at the same time making a similar charge against the Chicago, Burlington & Quincy Railroad Company and the Chicago, Rock Island & Pacific Railway Company. It was contended by Plaintiffs, therefore, that the Iowa Court had jurisdiction by reason of the venue provision of the Urgent Deficiency Appropriations Act of October 22, 1913, 38 Stat. L. 219, providing that the venue of a suit brought to enforce an order of the Interstate Commerce Commission shall be in the judicial district wherein

is the residence of the party upon whose petition the order was made. Since this order was made upon the petition of the Minneapolis & St. Louis Railroad Company, having its residence in the Southern District of Iowa, it was argued that the Iowa court had jurisdiction. Upon this jurisdictional point, the court held, as shown by its final decree and the memorandum opinion which accompanies the decree, that there was in effect at the time of the filing of the bill no order of the Interstate Commerce Commission which the court could enforce. The court points out the fact that the Interstate Commerce Commission by its order of December 22, 1922, dismissed the complaint which had given rise to the order of April 13, 1922, and that by reason of the dismissal of the complaint there was no order of the Commission in effect. For this reason a decree was entered dismissing the bill for lack of jurisdiction, the court's decree bearing date of August 19, 1925.

Thereafter, the Plaintiffs, Appellants here, on September 12, 1925, applied for, and were allowed, an appeal to the Supreme Court of the United States. Citation showing that an appeal had been taken bears date of September 12, 1925. The Court is now advised by Appellants' motion to remand that on November 10, 1925, the Interstate Commerce Commission entered an order vacating and setting aside its previous order of December 22, 1922. It is contended that this latest order of the Commission in some way affects the question of jurisdiction, and the Court is asked to remand the case without consideration of the record in order that Plaintiffs may, if they are so advised, file a supplemental bill in the nature of a bill of review, whereby the District Court may give consideration to the effect of the order of the Commission entered on November 10, 1925. It is contended, granting for the sake of the argument, that the court did not have jurisdiction of the original proceeding, nor indeed jurisdiction of the cause at the time when the final decree was entered, that it now has

jurisdiction by reason of this order of the Interstate Commerce Commission entered after the final decree and after the cause had been removed to this Court by appeal.

Since the motion is to remand the cause without consideration of the record, it must be taken as confessing that the court below was correct in its holding that it was without jurisdiction. The argument seems to be that where a court is without jurisdiction of a cause, and, therefore, properly dismisses the bill for want of jurisdiction, the Plaintiff should be allowed to file an amendment in the nature of a bill of review in order that it may demonstrate, if it can, that matters which have occurred since the bill was dismissed for want of jurisdiction would confer jurisdiction, if they had been in existence at the time the proceedings in court took place.

Passing over for the moment the question of whether the practice suggested by this motion is proper, we submit that it is thoroughly well settled that questions of jurisdiction must be determined by the facts existing at the time suit is brought, and that events which happen subsequent to the filing of the bill cannot be set up by amendment or otherwise so as to confer jurisdiction, if jurisdiction was originally wanting. In

Mollan, et al. v. *Torrance,* 9 Wheat 537,

Chief Justice Marshall, in passing upon a similar question, uses this language:

> "It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events. Since, then, one of the counts shows jurisdiction, and the plea does not contain sufficient matter to deny that jurisdiction, we think the judgment ought not to have been rendered on the demurrer in favor of the defendant."

This was decided in 1824, and the obviously sound rule thus laid down has never been departed from.

In

Conolly, et al. v. *Taylor, et al.*, 2 Pet. 556,

decided in 1829, Chief Justice Marshall, at page 564, recognizes the rule that jurisdiction depends on the state of the parties at the commencement of the suit and that no subsequent change can give or take it away. In that case the court held that jurisdiction was not lost by striking out the name of a complainant who was not an indispensable party. An amendment of this character, however, is not violative of the rule, since thereby, no events subsequent to the filing of the suit are depended upon to affect jurisdiction.

In

Stevens v. *Nichols*, 130 U. S. 230,

it is said:

> "The petition for removal does not allege the citizenship of the parties except at the date when it was filed, and it is not shown elsewhere in the record that Stevens and Mirick were, at the commencement of the action, citizens of a State other than the one of which the plaintiff was, at that date, a citizen. The court, therefore, cannot consider the merits of the case. *Metcalf* v. *Watertown*, 128 U. S. 586; *Morris* v. *Gilmer*, 129 U. S. 315, 325."

In this case it will be observed that although there were proper averments showing that the court had jurisdiction at the time of removal, this was held not to be sufficient, since the record must show jurisdiction at the time suit was brought.

In

Anderson v. *Watt*, 138 U. S. 694,

a suit was brought by Faber and Watt, both described as citizens of New York, against Anderson, Wilson and Davis, all described as citizens of Florida. The court concluded that Davis was an indispensable party, and it further appeared

that he was not a citizen of Florida, but a citizen of New York. When these facts appeared, it was sought to hold the case in Florida by amending the bill so as to charge that Watt was a subject of the kingdom of Great Britain and to show that Faber, subsequent to the filing of the suit, had been relieved of his duty as executor, and that Watt, the alien, had become the sole executor. In commenting upon the change in the status of Faber, which occurred subsequent to the bringing of the suit, the court uses this language:

> "But it is contended that the supposed defect was curable by amendment, and that this was actually done, and the court thereby justified in retaining jurisdiction. *Conolly* v. *Taylor*, 2 Pet. 556, is relied on. In that case a bill was filed in the United States court in Kentucky by aliens and a citizen of Pennsylvania. The defendants were citizens of Kentucky, except one who was a citizen of Ohio, on whom process was served in Ohio. The jurisdiction of the court was not questioned so far as respected the alien plaintiffs, but as between the citizens of Pensylvania and the citizen of Ohio, the court could not exercise jurisdiction. Before the cause was brought on, however, the court permitted the complainants to amend their bill by striking out the citizen of Pennsylvania as complainant and making him a defendant, and the question was whether the original defect was cured by this circumstance, and whether the court, having jurisdiction over all the parties then in the cause, could make a decree. This court held that jurisdiction depended upon the state of the parties at the commencement of the suit, which no subsequent change could give or take away; that if an alien became a citizen pending the suit, the jurisdiction which was once vested would not be divested; and so if a citizen sued a citizen of the same State he could not give jurisdiction by removing and becoming a citizen of a different State, but that just as the omission to state the character of parties might be corrected at any time before hearing, so by an amendment made by striking out the person whose presence as a complainant prevented the exercise of the jurisdiction, the impediment could be properly removed. The case was one, however, where the remaining complainants might have originally instituted the suit without joining the other unless

as a defendant, and the other was retained as a party by the amendment.

"In this case, on the 21st of December, 1886, after the proofs had been taken, but before the hearing, an amendment was permitted by the court by striking out the original averment as to the citizenship of the complainants Faber and Watt, executors, and inserting a new averment stating Faber's citizenship as before, but Watt to be 'a subject of the kingdom of Great Britain, temporarily residing in the State of New York,' and the cause was then directed, upon the ground that the letters of Faber had been revoked, to proceed in the name of James S. Watt, sole surviving executor of James Symington, and was discontinued as to Faber. But the difficulty with this attempt to obviate the fatal defect in jurisdiction was that the record showed that Watt was not the sole surviving executor of James Symington when the bill was filed, but on the contrary, when the application to amend was made, plaintiffs exhibited to the court and filed in the case exemplified copies of the records and files in the office of the surrogate of the county of New York in the matter of the application of Gustavus W. Faber for a revocation of the letters testamentary issued to him as one of the executors, by which it was shown that on the 4th of May, 1886, Faber filed his petition for the revocation of the letters as to him, and that the order of revocation was entered on that day. It therefore appeared that Watt could not have maintained the bill as amended, on the 25th day of August, 1885, when the bill as originally framed was filed, and jurisdiction could no more be given to the Circuit Court by the amendment than if a citizen of Florida had sued another in that court and subsequently sought to give it jurisdiction by removing from the State. *Clarke* v. *Mathewson*, 12 Pet. 164; *Morris* v. *Gilmer*, 129 U. S. 315." (pp. 707, 708)

See also

Laskey, et al. v. *Newtown Mining Co.*, 56 Fed. 628,

in which District Judge Ross reviews cases from this Court and reaches the conclusion that jurisdiction depends upon the situation that existed when the suit was brought.

In the light of these authorities, announcing elementary principles, it can readily be seen that the case of

Ballard v. *Searls*, 130 U. S. 50,

upon which Appellants rely, is without application. That case involved no question of jurisdiction. It deals with an extraordinary state of facts. One litigant was seeking to sell the property of another under execution based on a judgment which no longer existed. All the proceedings discussed in that case were had in courts of competent jurisdiction. It was clear that the court, having admitted jurisdiction of the cause of action, should, upon familiar equitable principles, relieve the aggrieved party from the obligation to pay a judgment which had been annulled.

But in the instant case, if the motion to remand is granted, no supplemental or amendatory proceedings can confer jurisdiction upon the District Court in Iowa. Whether a new suit would lie based upon the latest order of the Commission, we need not inquire, since such a question is not involved in this motion, nor, indeed, upon this record. The practice sanctioned in *Ballard* v. *Searls* is unusual. As said in

Ward v. *Joslin*, 105 Fed. 224:

> "There seems to be no doubt that, in a plain case of injustice, an appellate tribunal may reverse the judgment of the court below, to enable it to take further proceedings, for the purpose of working out the real rights of the parties, although this is rarely done." (p. 231)

It is suggested that if the Court does not remand this case, it should treat the showing here made of matters arising since the decision of the court below as supplemental to the record, and that the Court should consider the cause as if the record were so supplemented. It is obvious that this cannot be done. The new matter is an alleged order of the Interstate Commerce Commission, and it is well settled that the courts do not take judicial notice of the orders of the Commission.

Robinson v. *Baltimore & Ohio Railroad Co.*, 222 U. S. 506.

Furthermore, for the reasons heretofore stated, since this is a matter of jurisdiction, even if the Court were to consider the order of the Commission as being a part of the record, jurisdiction would not thereby be conferred, since it was wanting at the time the suit was brought.

Appellee contended in the court below, and will contend here when the case is reached upon the merits, that even if the Commission's order of April 13, 1922, be held to be in effect, the court was without jurisdiction to grant the relief prayed for, since the prayer of the bill is that Appellee be required to continue to switch freight for Appellants, whereas the order of the Commission makes no reference to such duty; that if it was the right of Appellants to require this service, the right did not depend upon an order of the Commission, but upon familiar principles of law hinted at in the opinion of this court in

Peoria & Pekin Union Ry. Co. v. *United States, supra,*

and which could be asserted, if at all, only by suit brought in the District of which Appellee was an inhabitant. This and other questions will be earnestly pressed upon the Court and furnish additional reasons why the case should not be disposed of without a hearing.

Aside from the jurisdictional defect, it is extremely doubtful if the alleged new matter can be set up successfully by a bill of review. Compare

Scotten v. *Littlefield,* 235 U. S. 407.

It is clear that if Appellants are satisfied that the decree of the court is correct, it should take the necessary steps to dismiss its appeal. The effect of such action would be to give finality to the decree of the court below. Thereupon Appellants would be at liberty to file such supplemental proceedings or such new proceedings as they may be advised.

We respectfully submit that the motion should be overruled and the cause heard on the merits on March 15, 1926, in accordance with the Court's order in the premises.

Respectfully submitted,

Robert V. Fletcher

Attorney for Appellee.

I hereby certify that a copy of this reply was mailed postage paid to each of attorneys for Appellants this 11th day of January, 1926.

R. V. Fletcher

FILED
MAR 9 1926
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No. 767

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY and W. H. BREMNER, Its Receiver,
Appellants,
vs.
PEORIA & PEKIN UNION RAILWAY COMPANY,
Appellee.

Appeal from the District Court of the United States, Southern District of Iowa, Central Division.

BRIEF AND ARGUMENT FOR APPELLEE.

ROBERT V. FLETCHER,
ATTORNEY FOR APPELLEE.

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO

INDEX.

PAGE

STATEMENT 1

ARGUMENT 11

Effect of Reopening Case 14

No order of I. C. C. in effect 12

Order cannot be Enforced 19

Venue of Suit for Equitable Relief 11

MOTION TO REMAND 23

TABLE OF CASES.

Anderson v. Watt, 138 U. S. 694 23

American Express Co. v. Caldwell, 244 U. S. 617 13

Ballard v. Searles, 130 U. S. 50 23

County of Mobile v. Kimbal, 102 U. S. 691 14

Conolly v. Taylor, 2 Pet. 556 23

Intermediate Switching Charges at Peoria, Ill., 77 I. C. C. 43 ..... 4, 5, 15

Laskey v. Newton Mining Co., 56 Fed. 628 23

Mallon, et al. v. Torrance, 9 Wheat. 537 23

Minneapolis & St. Louis R. R. Co. v. Peoria & Pekin Union Ry. Co., 68 I. C. C. 412, ... 4

Mobile & Ohio R. R. Co. v. Southern Sawmill Co., 212 Mo. App. 117 21

National Bank v. McDermand, 187 S. W. 121 16

PAGE

Pennsylvania R. R. Co. v. International Coal Mining Co., 230 U. S. 184 20

People v. Colvin, 165 Ill. 67, ... 16

Peoria & Pekin Union Ry. Co. v. United States, 263 U. S. 528 ..... 4, 7, 20

Rates, Regulations and Practices of P. & P. U. Ry. Co., 93 I. C. C. 3, ... 4, 10

Reynolds v. Hennessey, 17 R. I. 169 14

Robertson v. Railroad Labor Board, 268 U. S. 619..... 11

St. Louis Blast Furnace Co. v. Railroad Co., 24 I. C. C. 360 20

Stevens v. Nichols, 130 U. S. 230 23

United States v. Illinois Central R. R. Co., 263 U. S. 515, ... 13

West, et al. v. McMullen, et al., 112 Mo. 405, ... 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1925.

MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY and W. H. BREMNER, Its Receiver, *Appellants,* **vs. PEORIA & PEKIN UNION RAILWAY COMPANY,** *Appellee.*	Appeal from the District Court of the United States, Southern District of Iowa, Central Division.

BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT.

The action which gives rise to this appeal was begun in the United States District Court, Southern District of Iowa, by petition filed on August 6, 1925. The Plaintiffs are The Minneapolis & St. Louis Railroad Company and W. H. Bremner, its Receiver; the Defendant is Peoria & Pekin Railway Company. It is stated in the petition that the Plaintiff, Minneapolis and St. Louis R. R. Co., is a resident citizen of the Southern District of Iowa and that the Defendant is a corporation organized under the laws of the State of Illinois, with its principal place of business at Peoria, Illinois, and is a resident citizen of the State of Illinois. (R. 1)

After certain proceedings in the court below which will be referred to, the District Court on August 19, 1925, entered the following order:

> "That the service of process herein be quashed and set aside, the petition dismissed and the temporary injunction heretofore granted dissolved, with

costs to the petitioners, on the ground that this Court is without jurisdiction." (R. 50)

From this order of the District Court dismissing the petition, an appeal is prosecuted under Paragraph 4, Section 238, of the Judicial Code.

The suit was brought under the provisions of the Urgent Deficiency Appropriations Act of October 22, 1913, (38 Stat. L. 219) and also under the provisions of Section 207 of the Judicial Code, as amended. The petition seeks to enforce an order of the Interstate Commerce Commission. It is shown in the petition that the particular order of the Commission sought to be enforced was entered by the Commission on April 13, 1922, in a certain cause known as Docket No. 13110. The material portions of the order are as follows:

> "It is ordered, That the above-named defendant be, and it is hereby, notified and required to cease and desist, on or before July 13, 1922, and thereafter to abstain, from practicing the unjust discrimination and undue prejudice found in said report to exist in respect of said defendant's charges for intermediate switching between complainant and other railroads at Peoria and East Peoria, Ill., of freight cars moving in interstate commerce from and to points beyond the Peoria-Pekin, Ill., switching district.
>
> "It is further ordered, That said defendant be, and it is hereby, notified and required to establish, on or before July 13, 1922, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain charges or practices with respect to intermediate switching between complainant and other railroads at Peoria and East Peoria, Ill., of freight cars moving in interstate commerce from and to points beyond the Peoria-Pekin, Ill., switching district which will avoid and prevent the unjust discrimination and undue prejudice found in said report to exist." (R. 12)

The petition in this case concludes with a definite and specific prayer. An injunction is sought in the following language:

> "That the said defendant, Peoria & Pekin Union Railway Company, its agents and servants be enjoined and restrained from refusing to receive cars tendered by the petitioners or either of them for interchange to the tenants of the said defendant, Peoria & Pekin Union Railway Company, and that they be enjoined and restrained from collecting or attempting to collect any charge against cars moving in interstate commerce from the line of the Minneapolis & St. Louis Railroad Company for delivery to any of the tenants of the Peoria & Pekin Union Railway Company in violation of the order of the Interstate Commerce Commission entered in the cause pending before it entitled Minneapolis & St. Louis Railroad Company vs. Peoria & Pekin Union Railway Company, known as Docket No. 13110, and that it be enjoined and commanded to cease and desist from practicing the unlawful and unjust discrimination against the petitioners found by the report of the Interstate Commerce Commission in said proceeding and of said date to exist." (R. 4, 5)

This litigation is the outgrowth of a protracted dispute with respect to the right of the Peoria & Pekin Union Railway Company to make a charge for switching services which it performs. The Peoria & Pekin Union (hereinafter sometimes called the Union) is a switching and terminal line operating in the vicinity of Peoria, Illinois. Among other activities in which it engages is that of effecting an interchange of through cars among the several railroads that serve this territory. The Union insists that it is entitled to compensation for the switching service which it performs and that this compensation should be paid by whatever railroad delivers to it a car for transportation to a connecting line. The contention of the Union is supported by the Illinois Central Railroad Company, the New York, Chicago & St. Louis Railroad Company, Pennsylvania Rail-

road Company and others. On the other hand, the Minneapolis & St. Louis contends that the Union is not entitled to make any charge whatever against it, the Minneapolis & St. Louis, but that all cars should be delivered to and received from the M. & St. L. without charge. Certain railroads operating at Peoria agree with this view. The course and history of the controversy, which involves many intricate considerations, may be understood by examining the decisions of the Interstate Commerce Commission and a decision of this Court as shown by the following cases:

Minneapolis & St. Louis Railroad Company v. *Peoria & Pekin Union Railway Company*, 68 I. C. C. 412;

Intermediate Switching Charges at Peoria, Ill., 77 I. C. C. 43;

Rates, Regulations and Practices of Peoria & Pekin Union Ry. Co., 93 I. C. C. 3;

Peoria & Pekin Union Ry. Co. v. *United States*, 263 U. S. 528.

An examination of these cases will show that on August 30, 1921, the Union filed its tariff No. 36, imposing a charge of $4.00 per car for switching freight cars to and from the rails of the Minneapolis & St. L. Railroad Company (hereinafter sometimes called the M. & St. L.) from and to the rails of other trunk lines operating in the Peoria district. This charge was attacked by the M. & St. L. in cause No. 13110, decided by the Commission in the report and order shown in 68 I. C. C. 412. In that case the Commission held that the Union is an independent common carrier entitled to make a charge for its services, which charge should be paid by the line for which the service is rendered. It was held, however, that it would be unlawful discrimination for this charge to be imposed against the M. & St. L. unless a similar charge was made against other railroads occupying substantially the same situation as the M. & St. L. An order was,

therefore, entered (R. 12) requiring the Union to remove the discrimination and establish rates within thirty days which would be non-discriminatory. It will be observed that the Commission did not require Tariff No. 36 to be cancelled, nor was there any requirement that the Union should continue to switch cars for the M. & St. L. The entire holding was that while the Union should have the right to make a charge, it must charge all alike.

In order to comply with this requirement of the Commission, the Union filed a tariff imposing a similar charge upon other railroads. This last-mentioned tariff, known in the record as Tariff No. 40, was suspended by the Interstate Commerce Commission, and a further hearing was had which culminated in a report appearing as

Intermediate Switching Charges at Peoria, Ill., 77 I. C. C. 43.
(R. 14, *et seq.*)

In that case the Commission reached the conclusion that it would not make an order finally disposing of the issues, by reason of a defect in parties, and that a more comprehensive record must be made before the issues could be decided. This language is used in the report:

> "In short, there is apparently something more necessary to clear up the situation here presented than the mere piecemeal filing of particular tariffs covering services now alleged to be those of a common carrier. We shall not prejudge the question of the status of the respondent, nor the propriety of what rates or charges or divisions or practices should supplant the existing arrangements. In view of the determination made that these schedules have not been justified it will suffice here to indicate that we shall on our own motion institute an investigation, making all parties to this case and all tenants of the Peoria & Pekin Union respondents, to the end that lawful, just, reasonable, and nonprejudicial practices, rates, and charges, and divisions thereof, shall be established for the services undertaken by

them or any of them in connection with traffic moving to, from, through, or within the Peoria-Pekin district. * * *

"In view of the investigation to be undertaken we shall here make no finding in No. 13110, and shall issue a formal order of dismissal in that case, without prejudice to recanvassing the situation there involved in the course of the investigation aforesaid." (R. 19, 20)

Pursuant to this conclusion so announced by the Commission, an order was entered in No. 13110 which reads as follows:

"It appearing, That on April 13, 1922, the commission entered its report and order in the above case, and that on July 10, 1922, this case was reopened for further hearing;

"It further appearing, That such further hearing and full investigation of the matters and things involved has been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

"It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed." (R. 21)

It will thus be seen that the proceeding which led to the order of April 13, 1922, sought in this suit to be enforced, was dismissed by the Commission on December 22, 1922. It is obvious that when the complaint was dismissed, the order ceased to be effective since the dismissal of the complaint necessarily involved as well the dismissal and cancellation of the order. It is the contention, therefore, of the Appellee that there was no order of the Interstate Commerce Commission to be enforced and that, consequently, this suit must fail for lack of jurisdiction.

After the Commission made and promulgated its report of December 22, 1922, (77 I. C. C. 43), the Minneapolis & St. Louis refused further to pay the $4.00 charge provided for

in Tariff No. 36. Thereupon the Union served notice upon the M. & St. L. to the effect that the Union would no longer perform a switching service without compensation. The matter having been brought informally to the attention of the Interstate Commerce Commission, that body entered its Service Order 37 which required the Union to

> "continue to interchange freight traffic between the Minneapolis & St. Louis Railroad Company and connecting carriers at the regularly established interchange points at and in the vicinity of Peoria, Ill."

The validity of this order was reviewed by this Court in *Peoria & Pekin Union Ry. Co.* v. *United States,* 263 U. S. 528.

It was there held that the Commission had no power to make such an order without notice, and the order of the Commission was in effect set aside. In disposing of the case, this Court said:

> "The switching order here in question compels performance of the primary duty to receive and transport cars of a connecting carrier. That courts may enforce such duties by a mandatory injunction, including a preliminary restraining order, has long been recognized." (P. 535)

It should be explained that on January 8, 1923, the Commission entered a general order of investigation, and in connection therewith provided that Docket No. 13110 and other dockets should be reopened and consolidated with the general investigation. (R. 47, 48)

We have then this situation: The Commission upon the complaint of the M. & St. L. made an order that the Union shall cease to discriminate against the M. & St. L. by making a charge against that line without making a similar charge against other lines. The Union attempts to remove the discrimination by filing a tariff imposing a charge against the other lines. The Commission issues a second report

holding that a general investigation is necessary and stating that no finding will be made in the M. & St. L. case. Pursuant to this report an order is entered dismissing the complaint, which, of course, carries with it a dismissal of the order. Thereafter the Commission reopens the proceeding instituted by the M. & St. L. and makes it a part of the general investigation.

After this Court decided the case in 263 U. S. and after the District Court in conformity with the mandate of this Court had entered an order cancelling Service Order 37, the Union again gave notice to the M. & St. L. that it, the Union, would refuse to switch cars for the M. & St. L. unless compensation was paid therefor. (R. 4) Thereupon, on August 6, 1925, the petition in this case was filed in the United States District Court for the Southern District of Iowa seeking to enforce the Commission's order of April 13, 1922, (R. 12) and seeking to have the Union enjoined from refusing to perform the switching service. The reports and orders of the Commission, as reported in 68 I. C. C. 412 and 77 I. C. C. 43, were made exhibits to the petition. A temporary restraining order was granted without notice. (R. 22) Thereupon the Union, having been served with process in Illinois, on August 12, 1924, filed its special appearance and motion to quash service, (R. 22, *et seq.*), which motion was supported by an affidavit. (R. 26, *et seq.*) In this motion, the Union shows that it is not a citizen nor a resident of the State of Iowa but in fact is a resident citizen of the State of Illinois; that it, the Defendant, has no officers, agent or employes in the State of Iowa and transacts no business there; that it can not be sued, except by its consent, in the United States District Court in Iowa, and that suit can be brought against only in the District where it, the Defendant, resides and transacts business, this being the Southern District of Illinois.

By filing this document the Union objected to being sued elsewhere than in the State and District where it resides and does business, and the jurisdiction of the Court is accordingly challenged. It is further shown that while the petition pretends to seek enforcement of an order of the Interstate Commerce Commission, yet the jurisdiction of the Court on this ground must fail because there is no order of the Interstate Commerce Commission which can be enforced, since the order relied upon had been set aside by the Commission in its order of December 22, 1922, dismissing the complaint. It is shown further in the special entry of appearance and motion to quash that even if an order of the Interstate Commerce Commission be deemed to be in existence, the petition in this case does not seek to enforce such order but to compel Defendant to continue to switch cars, a matter which is not embraced in the order of April 13, 1922. It is further shown that the Court is without jurisdiction to enforce an order, the only requirement of which is to remove discrimination, since the Interstate Commerce Commission is the only body which can prescribe the manner and method whereby such discrimination shall be removed. The motion squarely raises the question of jurisdiction.

Without passing upon this motion, the learned District Judge on August 12, 1924, in order to preserve the existing status until the matter could be further heard, entered an order granting a temporary injunction with leave to file within a named time a motion to dissolve the injunction. (R. 29, 30, 31) Bond was required as a condition for issuing the temporary injunction. On September 17, 1924, Defendant entered a motion to dissolve the injunction. (R. 31, 32, 33) The matter was finally heard on the question of jurisdiction on July 28, 1925; and on August 19, 1925, a decree was entered dismissing the petition on the ground that the Court was without jurisdiction since there was no order of the Interstate Commerce Commission in effect which could be

enforced. The views of the Court are stated in a memorandum opinion appearing at pages 50, 51 and 52 of the Record.

Subsequent to the filing of the suit, but before it was finally decided, the Commission entered its report in the case known as

Rates, Regulations and Practices of Peoria & Pekin Union Ry. Co., 93 I. C. C. 3.

No order was made, however, the Commission being of opinion that the parties might be able to agree upon a settlement of the controversy in accordance with the views of the Commission expressed in the report. The Commission reaffirmed its previously announced view that the Union is a common carrier entitled to make a charge and held that whatever charge was established should be paid by the line delivering the traffic to the Union.

Subsequent to the rendition of the final decree in this case and after the cause had been appealed to this Court and docketed here, Appellants filed a motion to remand the cause without decision on the merits, based on the alleged fact that on November 10, 1925, the Commission had entered an order vacating and setting aside its previous order of December 22, 1922. This motion was in due course submitted to the Court and its consideration was postponed to the hearing on the merits.

It will be seen from this statement that the action of the lower court in dismissing the petition must be affirmed, i it appears that there was no order of the Interstate Commerce Commission which could be enforced in this cause.

ARGUMENT.

Venue of Suit for Equitable Relief.

It is clear that if the appeal in this case is considered as one seeking general equitable relief by mandatory injunction or otherwise, then the United States District Court for the Southern District of Iowa was without power to grant such relief, in view of the fact that the Union is, admittedly, a resident citizen of the Southern District of Illinois, transacts no business whatever in Iowa and cannot be sued against its will elsewhere than in the District where it resides. Section 51 of the Judicial Code provides that except as provided in the five succeeding sections, no civil suit shall be brought in any District Court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant. It is unnecessary to review the familiar authorities construing this statute. Whether the question be one of venue or of jurisdiction is a matter of no importance here, since the Defendant in this case entered a special appearance and objected to being sued elsewhere than in the District of its residence. (R. 22, *et seq.*) It is sufficient to refer on this phase of the matter to the very recent case of

Robertson v. *Railroad Labor Board,* 268 U. S. 619,

decided June 8, 1925, in which Section 51 of the Judicial Code is construed and applied.

We do not understand that Appellant contends that the Court would have jurisdiction unless there is an order of the Interstate Commerce Commission which can be enforced in a suit of this character.

No Order of Interstate Commerce Commission In Effect.

The suit seeks to enforce an order of the Interstate Commerce Commission, that being the order entered by that body on April 13, 1922, in cause No. 13110. The petition refers specifically to this order, and it is the theory of the prayer that the existence of this order entitles Plaintiff to the injunction sought. The terms of the Urgent Deficiency Appropriations Act of October 22, 1913, (36 Stat. L. 219) provide that a suit to enforce an order of the Interstate Commerce Commission may be brought in the judicial district wherein is the residence of the party upon whose petition the order was made. Since the M. & St. L. is a resident citizen of the Southern District of Iowa and since the order of April 13, 1922, was made upon the petition of the M. & St. L., it is contended that the United States District Court in Iowa has jurisdiction to enforce this order. Obviously, if the record shows that there is no such order in existence, then the Court would be without jurisdiction. There seems to be no controversy between the parties upon this proposition. It is conceded by Appellants that if the order of April 13, 1922, was not in effect at the time suit was brought, the suit was properly dismissed.

The order sought here to be enforced was made in a certain cause, No. 13110. The proceeding was instituted by a complaint filed by the Minneapolis & St. Louis Railroad Company. The report and order was based upon this complaint, just as a judgment in a law action is based upon a complaint, or a declaration. This complaint, No. 13110, was dismissed by order of the Commission entered on December 22, 1922. (R. 21) It would seem to be too plain for argument that when the complaint was dismissed, the order was likewise dismissed and ceased to be binding or effective. It should be remembered that the order here sought to be enforced was a discrimination order. Under its terms the railroad com-

pany was free to remove the discrimination either by making a charge against other lines or by ceasing to make a charge against the M. & St. L.

American Express Co. v. *Caldwell*, 244 U. S. 617;
United States v. *Illinois Central R. R. Co.*, 263 U. S. 515.

The Union elected to remove the discrimination by publishing a charge against the other lines. Its tariffs so providing were suspended. The proceeding in cause No. 13110 was, upon the petition of Complainants, reopened, the order so providing being entered on July 10, 1922. It may be admitted that when the Commission came on to make its report of December 22, 1922, (R. 13, *et seq.*) the order of April 13, 1922, was in effect. The Commission concluded, however, that additional parties should be brought in and a broader record should be made in order that all questions involved might be decided. No finding whatever was made in cause No. 13110 and the complaint in that cause was dismissed.

It can hardly be seriously argued that the complaint may be dismissed and the order left in effect. No case can be cited as authority for the proposition that when a suit is dismissed a judgment which may have been previously rendered is, notwithstanding the dismissal, left in effect and capable of being enforced. No court has ever held that if a cause proceeds to judgment and if a new trial is granted and as a result thereof the original complaint is dismissed there is left in effect a judgment which can be enforced by execution or otherwise. Learned counsel for Appellants contend that in proceedings before the Commission, this simple general rule should not be followed for the reason that by Paragraph 2 of Section 15 of the Interstate Commerce Act it is provided that orders when once entered shall continue in force until there is a further order of the Commission, and by reason of the further fact that by section 16(a) of the Act when the Commission grants a rehearing, its action in doing

so shall not excuse the carrier from complying with a requirement of the Commission or operate to stay or postpone the enforcement of the order unless the Commission specially so directs. This argument, however, fails to appraise correctly the effect of the Commission's order in dismissing the complaint. We are not contending that the Commission's order entered at the instance of Plaintiffs on July 10, 1922, reopening the case, has the effect of dismissing the order of April 13, 1922. Our contention is that the Commission's order of December 22, 1922 (R. 21) does not merely grant a rehearing. The effect of it is to dismiss the complaint. There is a vast difference between dismissing a complaint and granting a rehearing or reopening the case. It is clear that the effect of an order dismissing a complaint is substantially the same as if it had been dismissed "without prejudice." The effect of such a decree has been thus stated:

> "The intention and effect of such a reservation in a decree are, by express terms, to prevent it from operating as a bar to another suit. A dismissal 'without prejudice' leaves the parties as if no action had been instituted."
>
> *Reynolds* v. *Hennessey,* 17 R. I. 169, 175; 23 Atl. 639.

See also

> *County of Mobile* v. *Kimbal,* 102 U. S. 691, 705.

Since the dismissal of the complaint carries with it the dismissal of the order, there was no order of the Interstate Commerce Commission in effect on the date the petition in this case was filed and as a result the Court below was plainly without jurisdiction.

Effect of Reopening The Case.

It is said, however, that the order of April 13, 1922, which is here sought to be enforced, was reinstated by another

order of the Commission entered on January 8, 1923. (R. 48) The only reference to Docket 13110 in that order is found toward the close of the order where it is said:

> "It is further ordered, That Docket No. 13110 and Investigation and Suspension Dockets No. 1596 and No. 1455, be, and they are hereby, reopened, consolidated with and made a part of this investigation."

The argument seems to be that where a case has proceeded to judgment and where the tribunal rendering the judgment has dismissed the complaint, the subsequent order of the court reopening the proceeding suffices to reinstate the judgment and make it enforceable. The correctness of this contention may be tested by a simple illustration. If A brings a suit against B for damages and obtains a judgment for $1,000, and if B makes a motion for a new trial, which is successful, and as a result the suit is dismissed, and if A thereafter secures an order reopening the case, can A after the case is reopened and before it is finally decided place an execution based on the judgment in the hands of the Sheriff and seize the goods and chattels of B to satisfy such judgment? To ask such a question is, of course, to answer it.

It is perfectly clear that the effect of the Commission's order of January 8 reopening the case was simply to restore it to the docket, and to give it a status which is precisely the same as existed when the suit was first brought and before any decision was rendered in the matter. This conclusion is inescapable when we consider the language used by the Commission in its report of December 22, 1922, 77 I. C. C. 43. (R. 13, *et seq.*) The Commission there points out that a general investigation is necessary in order to clear up the situation and furnish the Commission with sufficient information to make a comprehensive order in the premises. It is said that the Commission will not prejudge the matter and that no finding whatever will be made in Docket No. 13110. This be-

ing the attitude of the Commission as expressed in its report, obviously the order of April 13, 1922, could not be left in effect. It was necessary to cancel all previously entered orders and to approach the matter just as if no orders whatever had been made. It will be noted that the Commission did not cancel the Tariff 36 filed by Defendant, imposing a charge for switching service upon the M. & St. L.

Counsel in support of the contention that when a case is reopened for further proceedings all judgments rendered in such case are reinstated cite two cases, these being:—

People v. *Colvin*, 165 Ill. 67,

and

National Bank v. *McDermand*, 187 S. W. 121.

The *Colvin case* (miscited in Appellants' brief as appearing in 116 Ill.) had to do, not with an order reopening a case, but with an order vacating a previous order. There is a vast difference between reopening a case and vacating an order dismissing a case. In the *Colvin case* it appeared that there was a statute in Illinois providing for special assessments to be levied against property for local improvements. Under the statute, before property could be subjected to such a special assessment, it was necessary for the assessment to be confirmed by a certain court procedure provided in the statute. In that case a judgment of confirmation was entered on February 19, 1892. On April 25, 1892 upon motion of the Plaintiff all orders theretofore entered in the cause were vacated and the petition was dismissed. However, on April 30, 1892, a further order was entered vacating the order which dismissed the petition. The court held that when the order dismissing the petition was vacated the effect was to reinstate the order of confirmation. The language of the court is:

> "When the first order was set aside and the cause reinstated upon the docket, it was there just as it

would have been if the order of April 25 had never been made."

Obviously, the court could reach no other conclusion. It will be observed, however, that the Commission by its order of January 8, 1923, did not vacate the dismissed order of December 22, 1922. If it had done so a different question might arise. The order of January 8, now under consideration merely reopened the proceeding. The *Colvin case* is, therefore, no authority for the extraordinary contention of the Appellants.

So in the *McDermand case*, which is cited, it appears that the decision dealt with a material-man's lien. The statute made it necessary to the enforcement of the lien that a proceeding be brought within a designated time. Such a proceeding was brought and was dismissed. Later a motion to reinstate the cause was sustained. In this case no judgment whatever was involved. The only point decided is that if a suit is brought to enforce a lien within the time required by statute, the lien is not lost because the suit is dismissed where it appears that the order of dismissal is vacated and set aside. We are not contending in this case that the M. & St. L. is prohibited from pursuing its case before the Commission by reason of the passage of time and the effect of the statute of limitations, that being the point involved in the *McDermand case*. The contention of Appellants is not supported by authority which deals with vacation orders. Such orders differ from an order merely reopening a proceeding.

An authority much more in point is

West, et al. v. *McMullen, et al.*, 112 Mo. 405; 20 S. W. 628.

In that case the Court says:

"When the court set aside the nonsuit, the parties were right where they were when the issues were

first made up. No right of the plaintiffs or defendants had been adjudicated. Plaintiffs had been driven to a nonsuit, and the setting aside simply restored them to a standing in court. They occupied precisely the same position as if they had voluntarily dismissed their suit, and commenced a new action, and defendant had answered. No action of the court previous to this was conclusive either upon the court or the parties. Had the court declined to set aside the nonsuit, this would not have been an adjudication constituting a bar to a subsequent action; much less could it have such a result when the court set aside the nonsuit. The only effect was to reinstate the cause for trial. This we regard too clear for argument. *National Water Works Co.* v. *School Dist. of Kansas City*, 23 Mo. App. 227; *Wells* v. *Moore*, 49 Mo. 229; *Homer* v. *Brown*, 16 How. 354; *Insurance Co.* v. *Broughton*, 109 U. S. 121; *Templeton* v. *Wolf*, 19 Mo. 101. Nothing had been determined by the trial in May, and, when the cause came on for trial in January, the proceedings had in May were of no effect."

It is inconceivable that this Court will reverse the District Court on the ground that the order of January 8, 1923, reopening the proceedings, has the effect of restoring the order of April 13, 1922, which had been dismissed by the order of the Commission entered on December 22, 1922. This order of January 8 did not vacate and set aside the order of December 22; it merely reopened the proceedings in Docket No. 13110, the necessary effect of which was to place the parties in precisely the position in which they found themselves when the suit was first brought and before any order had been made. There being no order of the Interstate Commerce Commission in effect, the Court below could do nothing but dismiss for lack of jurisdiction.

Appellants in their brief seem to rely upon a telegram sent by Mr. Commissioner Aitchison to the Union in which it is stated that the order against the Union stands unrescinded. However, we know of no principle of construction

which requires courts to give weight to the individual opinion of a judge, not expressed in an opinion or judgment, volunteered in a private telegram to one of the litigants and which is contrary to the facts of record.

Order Cannot Be Enforced In This Suit.

Even if it be conceded for the sake of the argument that the Commission's order of April 13, 1922, is in effect, an examination of the order and of the bill filed in an effort to enforce it, will show that the court below had no jurisdiction to grant the relief prayed for predicated upon the recitals of the order. The order (R.12) commands the Peoria & Pekin Union to cease and desist from practicing unjust discrimination in respect of charges for intermediate switching. This is the restrictive part of the order. The Defendant is commanded to file and post charges which will avoid the unjust discrimination. It is perfectly clear that since this is an order dealing with discrimination under Section 3 of the Act, its requirements may be met by publishing charges against railroads other than the M. & St. L. or by cancelling charges imposed against the M. & St. L. by Tariff 36. It is a form of order which, as entered, could not be enforced by the courts until after the Commission had passed further upon the matter. It is for the Commission alone to say, under familiar principles of law, whether a particular course of conduct, adopted by the Defendant, is a compliance with the order. In other words, it is a matter for the administrative judgment of the Commission as to whether what was done by the Union was sufficient to remove the discrimination. Obviously a court has no jurisdiction to say that a particular course of conduct adopted by the Defendant is in violation of the order.

It will be remembered that no order of the Commission has directed that Tariff No. 36 shall be cancelled. During the

progress of this entire litigation before commissions and before the courts this tariff has remained in effect. The Union has done no more than to insist that the tariff shall be observed and that the M. & St. L. shall pay the lawful tariff charge. The court in this case was asked to enter an order which will require the Defendant to handle cars in violation of the tariff and without collecting the amount named therein. The order of April 13, 1922, says nothing whatever about switching. It does not deal with the duty of the Union to switch cars. If such a duty rests upon the Defendant, it may be enforced by mandatory injunction or otherwise, as suggested by this Court in its opinion in

Peoria & Pekin Union Ry. Co. v. *United States*, 263 U. S. 528.

A suit, however, to require the Union to do this switching could not be maintained in Iowa, but only in Illinois, where the Union resides and where it must be found for service of process. The obligation upon every carrier to observe its tariff as long as this tariff remains on file with the Commission is very clear. As said by the Commission in one of its opinions:

> "It is the duty of the carrier to file the tariff and, having filed it, it is bound thereby until the same is cancelled or superseded on the records of this Commission."
>
> *St. Louis Blast Furnace Co.* v. *Railway Company*, 24 I. C. C. 360, 367.

In

Pennsylvania R. R. Co. v. *International Coal Mining Co.*, 230 U. S. 184,

this Court refers to the imperative obligation resting upon all carriers to charge, collect and retain sums named in its tariffs. That case also refers to the familiar holding that it was the purpose of Congress to vest in a single body the

power to pass upon expert questions committed to the Commission in order that there may be that uniformity which is essential to the proper administration of the law. A case which summarizes the familiar authorities and announces the familiar doctrine that carriers must observe their tariffs is

Mobile & Ohio R. R. Co. v. *Southern Sawmill Co.*, 212 Mo. App. 117, 251 S. W. 434.

It is there said:

> "We begin with the thoroughly settled rule that the legal rate is the *filed* rate, and it is the duty of the carrier to charge and collect the rate precisely as same is contained in the tariffs on file with the Interstate Commerce Commission. And this is so even though such rate be excessive, unreasonable, and unlawful. *Pittsburgh* v. *Fink*, 250 U. S. 577; *L. & N. Railroad Co.* v. *Maxwell*, 237 U. S. 94; *Dayton Coal Co.* v. *C. N. & T. P. Railroad Co.*, 239 U. S. 446; *Pennsylvania R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 185; *Armour Packing Co.* v. *U. S.*, 209 U. S. 56; * * * * *
>
> "But the respondent says, proceeding upon the theory that the Commission by its order held the 16-cent rate to be excessive, that the carrier could not subsequently and immediately thereafter refile a freight rate which was so held to be excessive, and, further, that the order of the Interstate Commerce Commission directing the carrier to cancel such 16-cent rate has the effect of annulling such rate. To this we cannot agree. It seems to be the rule that an order of the Interstate Commerce Commission directing the carrier to cancel a rate does not have the effect of annulling such rate. The Commerce Act gives the Commission power to make orders, and if such orders are not obeyed the law points out a method for compelling obedience thereto, and this is specifically prescribed in section 16 of the act. So long as the rate is on file, it is the duty of the delivering carrier to actually charge and collect the rate on file. Such rate is to

> be conclusively presumed to be the legal rate, and any departure therefrom is made an offense." (Citing authorities.)

This order deals solely with discrimination. That is a matter which is committed by law to the Interstate Commerce Commission, and no other tribunal has authority to say what constitutes discrimination and what steps must be taken to remove it. If the court had assumed jurisdiction in this case and had undertaken to make an order, certainly that order could not take the form of requiring the Union to continue to switch cars. That is a phase of operation with which the Commission's order does not deal. If we assume that the court could have required the Defendant not to make a charge against the Union, nothing would thereby be accomplished. The Defendant might cease to make a charge, but at the same time it might cease to move the traffic. If we examine the petition filed in this case it is clear that the real purpose is to secure an injunction in the nature of a mandatory injunction requiring the Defendant to continue switching. The prayer of the petition is that the Defendant be enjoined and restrained from refusing to receive cars, a matter not covered by the order and one over which a court in Iowa has no jurisdiction.

As indicating the character of the order here sought to be enforced and as showing that the Court is without power to enforce it, we call attention to the dissenting opinion of Mr. Commissioner Esch as shown on page 20 of the Record. That dissent was expressed in the case decided December 22, 1922. It is there said by Mr. Esch that the decision of the Commission continues in effect the unjust discrimination and undue prejudice found to exist in the original report. If this is a correct characterization of the effect of the opinion of the Commission and the order, it is not for the Court basing its action upon the supposed order of the Com

mission to substitute its judgment for that of the Interstate Commerce Commission and restrain the carrier from insisting upon its charges or in refusing to switch freight.

MOTION TO REMAND.

Appellants have filed in this Court a motion to remand the cause without considering the merits. This motion is based upon an alleged order of the Commission not shown in the record and which is alleged to have been entered subsequent to the taking of the appeal in this case. It is contended in the motion and argument in support of it that the case of

Ballard v. *Searles*, 130 U. S. 50,

furnishes a precedent for the action which the Appellants ask the Court to take. Appellee filed a reply to Appellants' motion to remand in which the attention of the court was called to the fact that this appeal involves a question of jurisdiction and that such a question must depend upon the state of things at the time the action was brought. We cited in support of this contention

Mollan, et al. v. *Torrance*, 9 Wheat. 537;
Conolly v. *Taylor*, 2 Pet. 556;
Stevens v. *Nichols*, 130 U. S. 230;
Anderson v. *Watt*, 138 U. S. 694;
Laskey v. *Newton Mining Co.*, 56 Fed. 628.

We pointed out the fact that *Ballard* v. *Searles*, *supra*, did not involve any question of jurisdiction. We insisted in our reply that if Appellants have reason to believe that events occurring subsequent to the final decree justify a reopening of the matter, they have the right to file a bill of review after the judgment of the lower court has become final by affirmance at the hands of this Court.

We respectfully ask the attention of the Court to Appellee's reply to the motion to remand and will not here repeat what is said in that document.

We respectfully ask that the judgment of the District Court be affirmed.

Respectfully submitted,

ROBERT V. FLETCHER,

Attorney for Appellee.

E E Horton